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29

REPORTS
OF THE
APPELLATE COURT

OF THE
STATE OF INDIANA,

WITH TABLES OF THE CASES REPORTED AND CITED, AND
STATUTES CITED AND CONSTRUED, AND AN INDEX.

CHARLES F. REMY,
OFFICIAL REPORTER.
JOHN W. DONAKER, Ass't Reporter.

12/31/21

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JUDGES
OF THE
APPELLATE COURT

OF THE
STATE OF INDIANA,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

HON. DANIEL W. COMSTOCK. *
HON. URIC Z. WILEY. †
HON. WOODFIN D. ROBINSON.
HON. WILLIAM J. HENLEY.
HON. JAMES. B. BLACK.

*** Chief Judge at November Term, 1896.**

† Chief Judge at May Term, 1897.

The term of office of each Judge began January 1, 1897.

OFFICERS
OF THE
APPELLATE COURT

CLERK,
ALEXANDER HESS.

SHERIFF,
DAVID A. ROACH.

LIBRARIAN,
JOHN C. McNUTT.

CASES
ARGUED AND DETERMINED
IN THE
APPELLATE COURT
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, NOVEMBER TERM, 1896, AND MAY TERM,
1897, IN THE EIGHTY-FIRST YEAR OF THE STATE.

THE TOWN OF KENTLAND v. HAGAN.

[No. 2088. Filed February 2, 1897.]

MUNICIPAL CORPORATIONS.—*Liability for Defective Streets and Sidewalks.*—An incorporated town may become liable for injuries resulting from defective streets and sidewalks. pp. 2, 3.

PRACTICE.—*Interrogatories to Jury—Venire de Novo.*—Allowing or refusing to allow certain questions to be asked the jury as a part of the special verdict is no ground for a *venire de novo*. p. 3.

SAME.—*Interrogatories to Jury.—New Trial.*—The allowing or refusing to allow any interrogatory, and the changing or modification of any interrogatory, by the court, may be objected to by counsel, and the exception to the ruling saved by bill of exceptions, and is properly presented by motion for new trial. p. 5.

APPEAL.—*When Evidence is Properly in the Record.*—The evidence is properly in the record on appeal where it affirmatively appears that the longhand manuscript of the evidence was first filed in the clerk's office and afterwards incorporated in the bill of exceptions, signed and certified by the trial judge and again filed in the clerk's office within the time allowed. p. 6.

From the White Circuit Court. *Affirmed.*

E. B. Sellers, W. E. Uhl, William Cummings, and William Darroch, for appellant.

A. W. Reynolds, M. M. Sills, and Frank Davis, for appellee.

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HENLEY, J.—This was an action brought by the appellee against the town of Kentland, to recover for damages sustained by appellee on account of a defective sidewalk in said town. The complaint was in two paragraphs. Appellant answered by general denial. There was a trial by jury and a special verdict, by way of answers to interrogatories, awarding appellee damages at \$3,500.00. Appellee remitted \$1,500.00 of the judgment, and upon his motion the court rendered judgment in his favor for \$2,000.00. At the proper time appellant moved for a *venire de novo*, which was denied, and the motion for a new trial overruled.

Errors were assigned as follows:

1. The complaint does not state facts sufficient to constitute a cause of action.
2. The court erred in overruling the motion for a *venire de novo*.
3. The court erred in overruling the appellant's motion for judgment on the verdict.
4. The court erred in overruling appellant's motion for a new trial.

We will examine the errors complained of in the order in which they were assigned and discussed by counsel for appellant.

Appellant attacks the sufficiency of the complaint solely upon the ground that an incorporated town is not liable in any instance for injuries occurring from defective streets or sidewalks.

The Supreme Court of this State has repeatedly held to the contrary, and this is not, therefore, an open question for this court. *Town of Centerville v. Woods*, 57 Ind. 192; *Lowrey, Admr., v. City of Delphi*, 55 Ind. 250; *Scudder v. Hinshaw*, 134 Ind. 56.

The same doctrine is also adhered to in the well considered case of *Board, etc., v. Allman, Admr.*, 142 Ind. 573,

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where Monks, J., delivering the opinion of the court, quotes with approval the following from the case of *Cones v. Board, etc.*, 137 Ind. 404: "It will be found that the authorities upon which cities and towns, as municipal corporations, are held liable for the results of the negligence of official duties make this distinction: That such municipalities are voluntary corporations organized for public purposes, and possessing legislative, administrative and judicial functions not possessed, to the same degree, by counties or townships, and that they exercise and enjoy advantages purely local and which are independent of the State, and inure to their benefit as distinguished from that of the State.

"We are aware that profound jurists do not agree with the doctrine that cities and towns are less governmental subdivisions of the State, * * * than counties or townships, but, aside from the reasons so stated for the support of the distinction, it is plain to us that counties have no such power as cities or towns to ordain, in a corporate capacity, what improvements shall be made, the free choice of agents to make them, and the discretion as to the rate of levy to be made for the same."

For the reasons above stated we do not think it necessary to further discuss this branch of the case.

Counsel for appellant, in their argument, contend that the court erred in overruling the motion for a *venire de novo*. The only reason argued by counsel in their brief being that the court permitted the jury to answer, over appellant's objection, certain interrogatories as a part of the special verdict returned. The allowing, or the refusal to allow certain questions to be asked the jury as a part of the special verdict is no reason to support a motion for a *venire de novo*, and such a motion should be overruled, unless the verdict,

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upon its face, is so defective as that no judgment can be rendered thereon. *Peters v. Ranta*, 120 Ind. 416; *Board, etc., v. Pearson*, 120 Ind. 426; *Bower v. Bower*, 146 Ind. 393.

At the request of appellant the court directed the jury to return a special verdict in the cause, upon all the issues therein, by way of answers to interrogatories. This was under our amended statute, which changed the practice from the narrative form of special verdict to the interrogatory form. Under the old system it was almost impossible for the jury to return an unbiased verdict. It was the practice of counsel for plaintiff and defendant to each prepare a special verdict in narrative form, reciting all the facts necessary to be found, covering all the issues in the cause. These went to the jury as prepared by the counsel. It was impossible for the jury not to know whose version of the facts they were adopting when they signed either the verdict prepared by counsel for plaintiff, or defendant. It was almost equally impossible, under the old law, for the jury, composed of men of ordinary intelligence, to discard both the forms submitted by counsel and prepare one of their own.

The legislature intended that the act of 1895, section 546, Horner's R. S. 1896, should remedy the defects set out above, and we believe that this subject will be accomplished if attorneys are by the trial court held strictly to the proper practice thereunder, and the trial courts themselves would use the same care in eliminating improper and duplicated questions, changing and reforming others if need be, that they would have used in preparing general instructions covering the law of the case. These general instructions in the trial of a cause, where a special verdict upon all the issues has been demanded, are unnecessary and improper; only such instructions

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would be proper in this cause as would instruct the jury as to the form in which the interrogatories should be answered, the measure of damages, the weight of the evidence, and upon whom was the burden of proof.

After counsel for both plaintiff and defendant have submitted to the court the interrogatories they have prepared and desire propounded to the jury, and the court has carefully inspected the same, the interrogatories which the court thinks proper to submit to the jury should, we think, by the court, or under its direction, be rewritten and renumbered and submitted to the jury as coming from the court.

The propounding or refusal to propound any interrogatory, and the changing or modification of any interrogatory, by the court, may be objected to by counsel, and the exception to the ruling saved by bill of exceptions and is properly presented by the motion for a new trial.

The jury in the cause before us answered one hundred and twenty-five interrogatories, and if we should strike from the verdict those objected to by appellant, those numbered 5, 6, 11, 13, 21, 22, 26, still the facts found in answer to the remaining questions cover all the issues in the cause.

The jury found by answers to proper interrogatories, outside of those complained of, that the marshal and board of trustees of said town of Kentland knew of the defect in the sidewalk where appellee was injured, for two or three months prior to the time of such injury; that they had ample time, in the exercise of ordinary diligence, in which to have repaired the same before the injury complained of occurred, and that appellee received injuries on account of the condition of the said sidewalk, from which he has and still suffers great pain. These are a few of the facts found; there is nowhere in the special ver-

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dict any fact found which would charge the appellee with contributing in any way to the injury received, but, on the contrary, the facts found show that appellee was without fault.

Upon the facts found by the jury, we think the court was right in overruling appellant's motion for judgment upon the verdict, and in rendering judgment in favor of appellee upon his motion therefor. Appellee contends that the evidence is not in the record. The record affirmatively shows that the longhand transcript of the evidence was first filed in the clerk's office. It was afterwards incorporated in the bill of exceptions, signed and certified by the trial judge, and again filed at the clerk's office, all within the time allowed. This is in compliance with the statute and in line with the decisions of this court.

The evidence in this cause upon which the jury based its finding of facts is very conflicting. We have carefully read the voluminous record and find that every material fact found by the jury is supported by some evidence. We cannot disturb the finding of the jury upon the evidence in the cause, nor can we say that the judgment rendered was excessive. The court below did not err in overruling the motion for a new trial.

Judgment affirmed.

WILEY, J., took no part in the decision of this case.

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THE HAMMOND, WHITING AND EAST CHICAGO ELECTRIC
RAILWAY COMPANY v. SPYZCHALSKI.

[No. 2,057. Filed February 2, 1897.]

STREET RAILWAYS.—*Collision With Locomotive at Crossing.*—*Complaint.*—In an action against an electric street railway company, by a passenger, for personal injuries sustained by reason of a collision of the electric car with a locomotive at a crossing, it is not necessary to allege that the electric railway was located on a public highway and that those in charge of the locomotive had given the proper signals designating an intention to cross the highway, where it is alleged that neither the locomotive nor the electric car gave any signal of its approach to the crossing, and that those in charge of the electric car saw the locomotive approaching and knew that it would reach the crossing at the same time with the electric car. *pp. 11, 12.*

CARRIERS.—*Passenger.*—Common carriers are required to exercise the highest degree of care, diligence, vigilance and skill in the transportation of passengers. *p. 12.*

SPECIAL VERDICT.—*Court May Modify Interrogatories.*—*Statute Construed.*—Under the Act of March 11, 1895, providing as to the form and manner of preparation of a special verdict, it is within the power of the court to modify interrogatories prepared by counsel, or to frame new ones, if those prepared by counsel are not so framed as to be readily understood by the jury, or if they might, in the opinion of the court, fail to elicit from the jury material facts. *p. 14.*

EVIDENCE.—*Proper Admission Of in Rebuttal.*—Where on the trial of an action against an electric railway company for personal injuries sustained by plaintiff in a collision of an electric car with a locomotive at a crossing, the motorman in charge of the defendant's car at the time of the collision testified as a witness for defendant that there was between him and the approaching locomotive a watchman's shanty, testimony that the shanty did not obstruct the motorman's view was properly admitted in rebuttal. *pp. 14-16.*

SAME.—*Rebuttal.*—Where in an action for personal injuries resulting in a miscarriage, the plaintiff's physician testified only as to plaintiff's general physical condition, and a medical witness for defense testified as to certain physical conditions which would tend to produce the miscarriage, it was proper to permit plaintiff's physician

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to testify on rebuttal, to the effect, that the physical conditions mentioned by defendant's witness did not produce the injury complained of. p. 16.

NEW TRIAL.—*Newly Discovered Evidence.*—*Affidavit in Support of Motion.*—*Counter-Affidavits, Scope Of.*—Where a motion is made for a new trial on the ground of newly discovered evidence, and is supported by affidavits, counter-affidavits may be filed questioning the credibility of the alleged newly discovered evidence. pp. 16–20.

PRACTICE.—*Indefinite Answers to Interrogatories by Jury.*—*Instructions.*—Where the evidence will warrant definite and specific answers to interrogatories submitted to the jury, and after deliberation the jury returns into court with indefinite answers, it is not error for the court to instruct the jury in relation to answering the interrogatories, and to send it back to the jury-room for further deliberation. pp. 19, 20.

APPEAL AND ERROR.—*Evidence.*—*Question Calling for a Mere Conclusion of Witness.*—Where on the trial of an action against an electric railway company for personal injuries sustained by plaintiff in a collision with a locomotive, a witness having testified that after the collision the conductor of defendant company took the names of the passengers, and asked if any one was hurt, it was not error to exclude the further question, as to whether "this inquiry was made loud enough for all to hear," as such question called for a mere conclusion of the witness. pp. 20, 21.

SAME.—*Evidence.*—On the issue as to negligence resulting in a collision between an electric car and a locomotive, it is not error to exclude the testimony of the conductor as to the instructions given him by the company as to his duties in exercising care at railroad crossings. p. 21.

SAME.—*Evidence.*—On the issue as to negligence resulting in a collision between an electric car and a locomotive, where it had been shown that the motorman and conductor had been discharged after the collision, it was not error to exclude the testimony of an official of the defendant electric railway company to the effect that he had no knowledge of plaintiff's injuries for three months after the men were discharged. p. 21.

From the Porter Circuit Court. *Affirmed.*

Walter Olds and Charles F. Griffin, for appellant.

Agnew & Kelly and H. A. Wambold, for appellee.

COMSTOCK, C. J.—This action was originally brought by appellee, Agnes Spyzchalski, against the

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appellant, The Hammond, Whiting and East Chicago Electric Railway Company and the Chicago and Calumet Terminal Railway Company, for damages resulting from an injury alleged to have been sustained by reason of the negligence of both the defendant companies, resulting in a collision at a crossing in Lake county, Indiana, and by reason of which appellee was injured.

At the conclusion of her testimony in the trial of the cause appellee dismissed the action as against the Chicago and Calumet Railway Company and trial was continued against appellant. A special verdict was returned in which appellee's damages were assessed at \$3,000, and judgment in her favor was rendered for that amount.

Appellant assigns the following errors:

“1.—Complaint does not state facts sufficient to constitute a cause of action.

2.—The court erred in overruling appellant's demurrer to complaint.

3.—Court erred in allowing appellee to file counter-affidavits to appellant's motion for a new trial.

4.—Court erred in overruling appellant's motion for judgment on answers of the jury to interrogatories.

5.—The court erred in rendering judgment for appellee on special verdict.

6.—The court erred in submitting interrogatories, drawn by itself, to the jury, on its own motion.

7.—The court erred in overruling appellant's motion for a new trial.”

We will consider the errors assigned in the order in which they are discussed in appellant's brief.

1.—The court erred in overruling demurrer to complaint.

The complaint, as has been stated, is against both companies. It alleges that said railways cross each other at a point of intersection near Whiting; that the

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steam engines cross, and trains of the Chicago & Calumet Terminal Railway Company pass and repass, and the electric cars of the Hammond, Whiting and East Chicago Electric Railway Company cross the tracks of the said defendant, the Chicago and Calumet Terminal Railway Company at said point; that they have owned and operated said railways for two years last past continually; that on the 28th of October, 1894, appellee was a passenger on a car of appellant, run by electricity; that she had paid her fare and defendant had agreed to carry her as such passenger safely, etc.; that while said electric car was being propelled along the railway of the said Hammond, Whiting and East Chicago Railway Company and under its control, toward the railway of the Chicago and Calumet Terminal Railway Company, and in plain view of the tracks of both defendants at the point of crossing, for a half mile each way from the point of crossing, a steam engine of defendant, the Chicago and Calumet Railway Company, approached said crossing on the tracks of the Chicago and Calumet Railway Company, under its management and control, both said car and engine being in full view of each other; that neither of said defendants made any effort to stop or check either the said electric car or steam engine and wholly failed to give any signal of the approach to the crossing of said engine and electric car, but negligently ran said engine and electric car to said point of crossing, reaching the same at the same time; that both defendants knew that said car and engine would reach said crossing at the same time; that as a consequence of said negligence said engine and car collided at said crossing, the car being thrown from the track and turned over, the plaintiff being thrown against the car and on the ground with great violence by reason of which she sustained great internal and external inju-

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ries; that she was at the time pregnant with child; that she was injured about the hips, abdomen, bowels and stomach, and as a consequence of such injuries she suffered a miscarriage resulting in the death of her unborn child, etc.

Appellant contends that as it is shown by the evidence that the electric railway was located upon a public highway the complaint should have averred that fact; that while the Chicago and Calumet Terminal Railway Company had perhaps a superior right to cross the highway, and it was the duty of the street railway to have stopped and allowed it to have crossed, had it known it was going to do so, yet the Chicago and Calumet Railway Company had no right to cross the tracks of the street railway upon a public highway without giving the signals required by statute, it being its duty at the distance of not less than eighty nor more than one hundred rods previous to crossing the highway upon which the street railway's lines were located to sound the whistle and continuously ring the bell of the locomotive from that point until it crosses the highway where the tracks were located; that the appellant had the right to rely upon the Chicago and Calumet Terminal Railway Company stopping its train of cars before it reached the highway, unless it had given the proper signals as required by statute; that it should have averred that appellant's electric railway was located upon a public highway and that the Chicago and Calumet Terminal Railway Company had given proper signals designating its intention to cross the highway; that otherwise it shows no fault upon part of appellant.

Counsel content themselves with the statement of the proposition, no authority is cited, no argument made. The complaint avers that neither the steam engine nor electric car gave any signal of its ap-

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proach to the crossing; that those in charge of the electric car saw the steam engine approaching and knew that it would reach the crossing at the same time with the electric car. In the opinion of the court there was due appellee from appellant a degree of care which did not authorize appellant, under the circumstances alleged, to indulge a presumption at the risk of the lives of its passengers.

As between the two companies, each would have the right to presume that the other would comply with the law, but the controversy here is not between them. The negligent conduct of the steam railway company could not excuse the negligence of appellant in running its car in the way of the engine. Appellant owed to its passengers, under the circumstances, the highest degree of care.

In this case it may, as it was properly said in *Prothero v. Citizens' Street R. W. Co.*, 134 Ind. 431, Judge Olds speaking for the court, "In relation to the general transportation of passengers when danger is constantly apparent, common carriers of passengers are required to exercise the highest degree of care, diligence, vigilance and skill." Citing *Beach on Contributory Negligence*, 2d ed., section 44; *Louisville, etc., R. W. Co. v. Snyder*, 117 Ind. 435; *Louisville, etc., R. W. Co. v. Lucas*, 119 Ind. 583; *Pennsylvania Co. v. Marion*, 123 Ind. 415.

Appellant next questions the right of the court to change or alter interrogatories submitted by a party, under the practice requiring a special verdict, and the right of the court to submit interrogatories on its own motion as a part of the special verdict.

In this case the court, on its own motion, prepared and submitted twenty-four interrogatories, to which action of the court the defendant at the time ex-

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cepted, and the action of the court is assigned as a cause for a new trial.

This question requires a construction of the statute under which special verdicts are authorized. Counsel for appellant claim that the authority of the court is limited to the modification of such interrogatories as are manifestly improper, when presented by counsel. Counsel further submit that the court erred in changing interrogatories submitted by the defendant; that when the court frames questions to be propounded to the jury "it oversteps its authority and enters the forum of the practitioner."

Counsel cite three interrogatories, modified by the court by striking out of each one the negative "not" which was immediately preceded by the auxiliary "was." For further illustration of this exception we give one of the interrogatories in which it is claimed the error was committed, viz.: "Is it not a fact that it did not exceed one minute from the time the street car stopped, west of the tracks, until it advanced and the collision took place?" The omission of the word "not" where it first occurs in this interrogatory is the alleged error. The answer to each of these interrogatories was "Yes." With "not" in, the answer would have been the same; the change by the court did not mislead or confuse the jury. Apart from the right of the court to erase any unnecessary word from an interrogatory, appellant was not in any way harmed. It is not contended by counsel that the answers to these interrogatories thus changed by the court were not true to the evidence.

The act of March 11, 1895 (Acts 1895, p. 248; section 546, Horner's R. S. 1896), provides that "such special verdict shall be prepared by the counsel on either side of such cause and submitted to the court, and be subject to change and modifications of the court." Coun-

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sel admit that the court may, under the statute, modify interrogatories, but contend that only those can be changed that are improper. A modification of an interrogatory which abridges and simplifies it without tending to confuse the jury is, we think, clearly in the power of the court.

It is recognized as true that attorneys represent only their respective clients and that interrogatories prepared by them are generally only intended to elicit answers consistent with, and tending to support their respective theories of the case. It is the duty of the trial court to see that the questions are so framed as to be readily understood by the jury and to elicit the truth without reference to the effect upon the interests of either of the parties litigant.

The court has power to determine whether an interrogatory be properly framed. *Nichols, Admr., v. State, ex rel.*, 65 Ind. 512.

Such modifications as are contemplated by the statute may involve the framing of a number of interrogatories. If the interrogatories prepared by counsel might, in the opinion of the court, fail to elicit material facts it would be the duty as well as the right of the court to frame additional ones. We think this is clearly the meaning of the statute.

Appellant's counsel also claim as error the action of the court in admitting the testimony of witnesses Reynolds, Curry, Funkhauser, Murphy, Crone and Snively, for appellee, after she had closed her original case and dismissed as to the Chicago and Calumet Railway Company, and the defendant, the Street Railway, had introduced its evidence and rested. The objection made is that it was not properly rebutting; that it was a part of appellee's original case.

The testimony of these witnesses was material and it is admitted by appellant's counsel that the court

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might have exercised its discretion in permitting plaintiff to introduce this class of evidence out of its order, upon the ground of discretion, allowing appellant an opportunity of rebutting it. Citing "it is within the sound discretion of the court to admit evidence to sustain the action in chief, after the defendant has closed his defense, when the defendant still has an opportunity to contradict it; and such discretion would have to be greatly strained before it would become ground to reverse the judgment." *Carter v. Zenblin, Admr.*, 68 Ind. 436; *Sharp v. Radebaugh*, 70 Ind. 547.

George Little, motorman for appellant, in charge of the car at the time of the accident, testified, as a witness for appellant, that there was to his left, between him and the approaching train, a small watchman's shanty. No one had spoken of this shanty, on the part of appellee, except a Mr. Turner, who had testified as to the location of the watchman's house in connection with a plat intended to show the jury the tracks and surroundings. The evident purpose of the motorman's testimony was to show that the shanty obstructed his view of the approaching train. The testimony of Reynolds, Curry, Shirts, Funkhauser and Murphy was intended to show that the motorman could see the approaching train from the point where he stood before his car started, for the reason that the shanty was not between him and the approaching train. For this reason it was rebuttal.

Besides, the record shows that the court stated in admitting this testimony of Reynolds, "I think as a matter of discretion I will hear the witness with regard to the question as to the whereabouts of the shanty."

The record does not disclose that appellant made any offer to introduce testimony to rebut the testi-

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mony of these witnesses. It cannot, therefore, be said that the right was denied.

Appellant claims as error the permitting of Dr. F. G. Ketchem to testify in rebuttal, after he had testified as to the injuries of plaintiff for appellee in chief; that he was permitted in his re-examination and rebuttal over the objection of appellant to give his opinion as to additional injuries from which it was contended plaintiff was suffering. It is shown by the record that Dr. Ketchem testified, when first upon the stand, that he had examined plaintiff and stated her general condition. Appellant called Dr. David J. Loving, who testified that there was laceration of the neck of the womb, occasioned by child birth, and that the womb was enlarged and inflamed and catarrhal, and that such laceration might tend to abortion. Dr. Ketchem was then called in rebuttal to testify upon the subject of the laceration which was mentioned by Dr. Loving, who testified as to the laceration, its probable effects and the time of its occurrence, for the purpose of showing that it was not the laceration which produced the abortion of which plaintiff complained.

The laceration, its cause and effect was first mentioned by Dr. Loving, and it was proper to rebut his medical opinion.

The next alleged error is the overruling of the motion for a new trial, on the ground of newly discovered evidence.

Affidavits are filed to show that after the trial the appellant discovered evidence that appellee was, prior to the 28th of October, 1894, not a strong, healthy woman, but an invalid and subject to miscarriages. Representatives of appellant attempt in these affidavits to show diligence made unavailing to obtain information before the trial, owing to the adverse conditions under which they prosecuted their inquiries.

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Appellee, upon the trial, testified that she had been a strong, healthy woman; that she was married to her present husband in 1885; that between that time and 1893 she had borne him four strong and healthy children; that she was pregnant at the time of the accident. Appellee, in answer to affidavits filed by appellant, presented the affidavit of herself and husband, and the affidavits of nine other persons, her neighbors and acquaintances for years, all concur that prior to the accident appellee was a healthy woman. The fact that she was delivered of four healthy children within eight years and was pregnant with a fifth at the time of the accident is a sufficient refutation of the statement that she was subject to miscarriages. So, without passing upon the question of whether due diligence was shown by appellant in seeking information before trial, we think, the newly discovered evidence is fully met by the counter-affidavits. Counsel for appellant contend that counter-affidavits were not admissible to controvert any facts except those relating to the question of diligence. The latest expression of the court upon this subject is found in *First Nat. Bank, etc., v. Gibbons*, 7 Ind. App. 629, and is decisive of the question.

The decision is important, as it is the first expression upon the subject, where the question was squarely presented to either the Supreme or Appellate Court of this State. Prior to the decision of *First Nat. Bank, etc., v. Gibbons, supra*, there were reported cases in this State which seemed to indicate that counter-affidavits might be received as to the truth of the matter stated to be newly discovered evidence. *DeHart v. Aper*, 107 Ind. 460; *New Castle, etc., R. R. Co. v. Chambers*, 6 Ind. 346; *Harris v. Rupel*, 14 Ind. 209.

These cases, however, only recognize the practice,

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no objection having been made to the counter-affidavits.

Also, in *People, ex rel., v. Superior Court, etc.*, 10 Wend. 286; *Ames v. Howard*, 1 Sumner (U. S.) 482; *Williams v. Baldwin*, 18 Johns. 489; *Coast Line R. R. Co. v. Boston*, 83 Ga. 387, 9 S. E. 1108; *Thompson v. Thompson*, 88 Cal. 110, 25 Pac. 962, the practice of receiving counter-affidavits as to the truth of the statements of the newly discovered witnesses is recognized, although the right to consider them was not raised.

In *Finch v. Green*, 16 Minn. 355, the question was squarely presented and decided, the court holding that it was proper to receive counter-affidavits for the purpose of showing that the alleged ground for a new trial had no existence.

In *First Nat. Bank, etc., v. Gibbons, supra*, counsel for appellant contended, as do the counsel for appellant in the case at bar, that judicial controversies ought to be determined upon the fullest presentation of facts; that one of the most sacred rights under our law is the right of the party to demand that the facts of his case shall be passed upon and determined by a jury of his peers. If a party, without his fault, has been deprived of important and material evidence upon a trial, he should have another opportunity to present the entire facts to another jury, whose exclusive province it would be to determine as to the credibility of the witnesses and the weight to be given to their testimony and the facts established by the testimony. That if the court assumes to consider counter-affidavits as to such matters it determines in advance the very things which belong to the exclusive province of the jury.

The court conceded the force of the argument, but held that the counter-affidavits were properly re-

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ceived, stating that, "it is undeniably true that there are many facts in judicial controversies which a party is not entitled to have submitted to a jury," and that, in the opinion of the court, no "extraordinary hardship is imposed upon the unsuccessful party by the practice of admitting counter-affidavits as was done in this case." *Thornburg, Admr., v. Buck*, 13 Ind. App. 446. The case of *First Nat. Bank, etc., v. Gibbons, supra*, is cited and approved upon the same proposition.

It is clearly shown by the evidence that appellee was bruised and injured about the breast and abdomen; that she was that day taken sick, and was sick for three weeks with symptoms of abortion, at which time the miscarriage occurred.

The court does not feel justified, in view of the statements pro and con in the affidavits, to disturb the ruling of the trial court on said motion. Newly discovered evidence, to warrant the granting of a new trial, should be of such a decisive character as to render it reasonably certain that another trial would bring about a different result. *Morrison v. Carey*, 129 Ind. 277.

After the jury had retired and deliberated twenty-four hours, they returned into court with answers to the interrogatories, and the court having examined them, gave the jury instructions directing them in relation to answering certain of the interrogatories; after these instructions were given, the jury again retired.

One of the interrogatories in question, No. 32, was as follows: "Did the mortorman in charge of the street car of the defendant, which collided with the car on the track of the Chicago & Calumet Terminal Railway Company, look and listen for approaching trains before proceeding to move his car forward across the tracks of the Chicago & Calumet Terminal Railway

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Company at said point?" To which the jury answered, "There is no evidence that he did look or listen."

When the jury finally returned to the court, their answer to this interrogatory was "No."

Interrogatory No. 17 is as follows: "If you find the fact to be that the mortorman might have looked at that train and thereby avoided the collision, state whether he did look at that point?" Their answer was, "There is no evidence that he did look." After the instruction their answer to this question was "No."

Counsel for appellant objected to the directions given the jury as to these interrogatories. We think the objection was not well taken. It is the duty of the court, expressed in numerous decisions of the Supreme Court, to require a jury to give definite and specific answers to interrogatories, when the evidence will warrant it. That the evidence did warrant it in this case is made apparent by the direct answers. *Peters v. Lane*, 55 Ind. 391; *Carpenter v. Galloway*, 73 Ind. 418; *Pittsburgh, etc., R. W. Co. v. Hixon*, 110 Ind. 225; *Cleveland, etc., R. W. Co. v. Asbury*, 120 Ind. 289.

Counsel object, too, that the instructions as to these interrogatories were not given in writing. The record does not show that there was a request that the instructions should be in writing.

A Mr. Turner testified as a witness in behalf of the defendant. He was asked, "what is the fact as to any inquiry after you arrived there as to any person being hurt?" And the witness answered, "The conductor came around taking the names of the people and asked if there was any one hurt. I believe the conductor of the railroad train did the same thing. The witness was then asked, "Was this inquiry made loud enough for all the people to hear it?" To which appellee objected, and the court sustained the objection, and

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appellant excepted. There was no error in this ruling. The question called for a mere conclusion of the witness. It was for the witness to describe the circumstances and the tone of voice in which the question was asked, and for the jury to determine whether appellee had heard. Appellant also excepted to the ruling of the court in refusing to allow one Frank Crone, conductor on the electric car, who testified as a witness in behalf of appellant, to testify as to the instructions given him by the appellant as to his duties in exercising care at railroad crossings. There was no error in this. Instructions to the agent or employe to be cautious and diligent would not excuse negligence if the agent disregarded the instructions.

Finally, it is contended that in as much as it was shown, upon cross-examination of the motorman and conductor, that they were discharged from the employment of the street railway company, appellant should have been permitted to prove by A. M. Turner that at the time, and three months after he discharged them, he had no knowledge that any person had been hurt by the collision, except a Mrs. Jullier.

If the plaintiff was injured, as alleged in her complaint, and as the jury have found that she was, whether these employes were discharged because their negligence may have contributed to the injury of one passenger or of many could not affect the rights of plaintiff.

We have carefully examined the record and read with profit the able and instructive briefs of counsel. We concede the force and ingenuity of the argument in support of the appeal, but we have found no error entitling the appellant to a new trial.

Judgment affirmed.

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THE CHICAGO AND ERIE RAILROAD COMPANY v.
WAGNER, ADMINISTRATOR.

[No. 1,880. Filed Nov. 5, 1896. Rehearing denied Feb. 3, 1897.]

MASTER AND SERVANT.—*Knowledge of Danger.—Assumption of Risk.*

—It is the duty of the master to furnish reasonably safe places in which, and appliances with which the servants are to work, and to exercise the same care to keep them in such condition. The servant assumes all risks ordinarily incident to the work in which he engages, but he does not assume the hazards occasioned by the master's negligent breach of duty, unless with knowledge thereof he continues in the master's service. *p. 23.*

PLEADING.—*Complaint.—Sufficiency of in Action for Damages.—*

Negligence.—In an action against a railroad company to recover for the death of plaintiff's decedent the general averments of negligence, or want of contributory negligence or knowledge of dangerous defects, will be deemed sufficient as against a demurrer, unless the facts specifically stated clearly show the contrary; the general averment of knowledge or want of knowledge includes both actual and imputed knowledge. *p. 24.*

APPEAL AND ERROR.—*Bill of Exceptions.—Longhand Manuscript of*

Evidence.—A statement in the bill of exceptions that "the following is the original longhand manuscript as the same was made and filed," sufficiently shows that such manuscript was filed before it was incorporated in the bill of exceptions. *pp. 25, 26.*

MASTER AND SERVANT.—*Assumption of Risk.*—A railroad brakeman,

although without experience, assumes the dangers incident to coupling gravel cars constructed in such manner that by reason of aprons or an extension of the floor of the car at each end only about an inch of space was left between the cars when shoved together, when such aprons were in plain view of the brakeman and he had abundant time and opportunity to see them and had his attention called to them by the conductor and to the necessity of keeping from between them. *pp. 26, 27.*

EVIDENCE.—*Assumption of Risk.—Burden of Proof.*—In an action

for the death of an employe the burden is on plaintiff to show that decedent did not assume the risk of the danger. *p. 27.*

From the Huntington Circuit Court. *Reversed.*

W. O. Johnson, J. B. Kenner, and U. S. Lesh, for appellant;

J. Fred France and Z. T. Dungan, for appellee.

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GAVIN, J.—Appellee sued to recover for the death of his decedent, appellant's servant, who lost his life through its negligence.

It is charged in the complaint that the decedent was, when employed by appellant, without experience or training as a brakeman, of which fact appellant was informed; that appellant operated a gravel train, the cars of which were provided with aprons at each end consisting of a plank platform, being really an extension of the floor of the car, by means of which, when the cars were coupled, there was formed a continuous floor without any open space between the cars; that these aprons ought to have been and were usually put on with hinges so that they could be folded back, thus leaving the space between the cars open; but appellant's cars were negligently and carelessly constructed without any hinges for the aprons, which were thereby fixed and fast to the end of the car, thus making them unsafe and dangerous, as appellant knew, but that decedent was ignorant of the unsafe and dangerous construction of such cars; that without any notice of their character, and without any instruction from appellant as to how such cars should be coupled, he, without fault or negligence, undertook to make a coupling of such cars and was caught by the aprons, and crushed to death.

The correlative rights and duties of master and servant are considered and authorities cited in *Pennsylvania Co. v. Witte*, 15 Ind. App. 583; *Louisville, etc., R. W. Co. v. Quinn*, 14 Ind. App. 554.

We do not deem it necessary to again review them.

It is well settled that it is the duty of the master to exercise reasonable care to furnish reasonably safe places in which, and appliances, with which the servants are to work, and to exercise the same care to keep them in such condition. It is also true that the

servant assumes all the risks ordinarily incident to the work in which he engages, but the servant does not assume the hazards occasioned by the master's negligent breach of his duty, unless, with knowledge thereof, he continues in the master's service, when, as a general rule (subject to some exceptions with which we have not now to deal), the servant is in Indiana held to assume these added hazards.

In actions such as this the general averments of negligence, or want of contributory negligence, or knowledge of dangerous defects, will be deemed sufficient as against a demurrer, unless the facts specifically stated clearly show the contrary. *Evansville, etc., R. R. Co. v. Malott*, 13 Ind. App. 289; *Eureka, etc., Co. v. Bridgewater*, 13 Ind. App. 333.

The general averment of knowledge or want of knowledge includes both actual and imputed knowledge. *Pennsylvania R. R. Co. v. Witte, supra*.

It is urged by counsel that the facts set forth show that the deceased must have known the condition of these cars, because it was open and obvious. It is sufficient answer to this to say that for aught that appears, this coupling may have been undertaken in the dark, or in such a storm, or under such circumstances requiring haste and speed, as that he may not have had the opportunity to learn their character. The specific facts are not sufficient to overthrow the general allegations.

When we take up the consideration of the questions presented by the motion for a new trial, we are confronted with the contention of counsel for appellee that the evidence is not in the record, because it does not appear that the reporter's manuscript, which is embodied in the transcript without copying, was filed with the clerk, before it was incorporated in the bill of exceptions.

In *Hull v. Louth, Gdn.*, 109 Ind. 315, the Supreme

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Court held it to be sufficient compliance with the statute that the evidence should be filed with and as a part of the bill of exceptions.

In *Holt v. Rockhill*, 143 Ind. 530, however, that court stated: "A strict compliance with the statute, therefore, requires that such longhand manuscript be filed in the clerk's office before it is incorporated in the bill of exceptions, and that fact must be shown in the transcript in the bill of exceptions or in some other appropriate way." Whether or not, however, this strict construction should be given, and the statute enforced as mandatory, the court did not absolutely decide. In *DeHart v. Board, etc.*, 143 Ind. 363, that court did, however, authoritatively declare the rule to be as intimated in the decision first quoted. Saying: "There is nothing to show that the longhand manuscript was ever filed in the clerk's office before it was incorporated in the bill of exceptions. This, the statute requires to be done. Section 1476, Burns' R. S. 1894 (1410, R. S. 1881)."

These cases are followed and approved in *Smith v. State*, 145 Ind. 176, and *Hull v. Louth, Gdn., supra*, is there declared to have been overruled by them. The court announcing that "it is the rule, as required by said statute, and as firmly fixed by the decisions of this court, that the longhand manuscript copy of the evidence, as taken down by the shorthand reporter, shall be filed in the clerk's office before it is incorporated in the bill of exceptions."

The rule established by these cases is reaffirmed in *Indiana, etc., R. R. Co. v. Lynch*, 145 Ind. 1; *Beatty v. Miller*, 146 Ind. 231; *Thrash v. Starbuck*, 145 Ind. 673.

In this case, the bill of exceptions certifies, upon its first page, that the evidence, rulings, etc., were duly taken down by the official reporter, "of which

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evidence, rulings, objections and exceptions so made and taken, the following is the original longhand manuscript as the same was made and filed."

In *Holl v. Rockhill, supra*, it will be observed that the court expressly recognizes the bill of exceptions as one of the appropriate sources from which this court may learn that the manuscript was filed before it was incorporated in the bill of exceptions. This fact is, by the bill in this case, satisfactorily established.

From the evidence it appears that the deceased had been in appellant's employ as an extra brakeman for several months, that the conductors under whom he worked had reported him to be awkward, clumsy and careless, and not able to think and act quick enough to make a competent brakeman, and refused to take him out with them; that for this reason the trainmaster, desiring to furnish him employment, directed him to report to Mr. Firman, the foreman in charge of work in a cut, and he would set him to work. The trainmaster, after conferring with Firman, directed him to transfer a switchman to the work of braking and to give deceased his place. On the next day, deceased went out to the cut and reported to the conductor of the train, who set him to braking, supposing that was what he was sent for. The conductor testifies that while he was fixing a brake upon a car which was then coupled to another, he called deceased's attention to the aprons and told him he must keep away from between them and must stoop down under and use a stick to make a coupling. The day was clear and bright. About eight o'clock in the morning deceased undertook to make his first coupling and was caught by the aprons while standing between the cars and was crushed to death. The cars were eight or ten feet, or a car length apart when he

gave the signal to shove them together. There was nothing to require unusual haste, there was no unusual speed of the approaching car and nothing to detract his attention from his work, so far as the evidence discloses. The aprons projected on each car about twelve inches, leaving only an inch between them, when the cars were shoved up together. The apron extended across the full width of the car and beyond and over the pin which held the link in place. When he raised the pin he could not help but see the apron, if he looked at all. So far as appears there was nothing whatever to prevent his seeing the apron upon the coming car.

The evidence is absolutely without contradiction that these aprons were in plain view, clearly to be seen; that he had abundant opportunity to see them, and that his attention was expressly directed to them and to the necessity of keeping out from between them. The averment that he was ignorant of the character of the cars is, therefore, necessarily, wholly unproved.

In our State the burden is upon the plaintiff to show, in such actions as this, that he did not assume the risk of the danger. Knowledge of the danger or the existence of such facts as that by the exercise of reasonable care he might have known thereof, ordinarily, constitutes an assumption of the risk. *Louisville, etc., R. W. Co. v. Quinn, supra*, and authorities there cited.

As we said in *Pennsylvania Co. v. Witte, supra*, assumption of the risk is an independent element or factor, the nonexistence of which must be specifically denied in the complaint and satisfactorily proved upon the trial, and "although the servant may not have actual knowledge of the existence of the dangerous defect, if the defect is open and obvious, so that

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in the exercise of reasonable care in the discharge of his duties he ought to have known it, then he will be deemed to have known that which he should have learned. *Muncie Pulp Co. v. Jones*, 11 Ind. App. 110; *Lynch v. Chicago, etc., R. R. Co.*, 8 Ind. App. 516.

We have endeavored to give to this case that attention and consideration asked for by the earnest appeals of counsel, but are compelled to conclude that the appellee failed to establish this essential element of his case.

Judgment reversed, with instructions to sustain the motion for a new trial.

ON PETITION FOR REHEARING.

HENLEY, J.—Counsel for appellee contend that a rehearing should be granted in this case and earnestly insist that the evidence is not in the record. We have carefully examined the record and find therefrom that the longhand transcript of the evidence was first filed in the clerk's office, that the same was certified as correct by the trial court, and that afterwards the bill of exceptions, containing the longhand transcript, was filed with the clerk. This is a compliance with the rule as established by the Supreme Court and followed by this court. We find no cause, upon examination of the evidence to in any way change the decision of the court heretofore announced upon this appeal.

A rehearing is denied.

Elkhart and Western Railroad Company v. Waldorf.

THE ELKHART AND WESTERN RAILROAD COMPANY
v. WALDORF.

[No. 2,101. Filed February 4, 1897.]

APPEAL.—*Law of Case.*—A decision of the Appellate Court, whether right or wrong, is binding upon a subsequent appeal.

SAME.—*Excessive Damages.*—A verdict will not be disturbed on appeal on the ground of excessive damages, unless it is so excessive as to indicate that the jury acted from prejudice, partiality, or corruption.

EVIDENCE.—*Opinion.*—Where the facts were fully placed before the jury, it was not error to exclude opinion evidence based thereon, where an opinion could have been readily formed by the jurors.

SAME.—*Where a Witness is Asked to Repeat a Conversation.*—A witness who is asked to repeat a conversation had at some previous time must give the conversation as it occurred, or the substance of it, and leave the court or jury to determine what the parties intended.

From St. Joseph Circuit Court. *Affirmed.*

Henry C. Dodge, for appellant.

A. L. Brick and *Alex. Wilhelm*, for appellee.

ROBINSON, J.—In the spring of 1893 the appellee was the owner of two certain adjoining tracts of land containing one and one-half, and ten acres, respectively, and the appellant, desiring to construct its railroad over said land bought the same and received a deed containing the following clauses:

“Said grantor reserves the right to possession of the entire tract of land, above described, for a period of one year from the date hereof, except a right of way sixty-six feet wide across the first above described tract of land. Also the right of possession for a period of two years, from the date hereof, to all that portion lying south of said right of way, unless said party

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shall desire all, or any portion thereof, except that portion occupied by said brickyard, for railroad purposes.

"The grantee hereby agrees to put in all necessary crossings for the use of the grantor, during his occupancy of said premises.

"Grantee reserves the right to enter any portion of said premises at all times to make any needed repairs, or to protect said property in any manner. Said grantor, during his tenancy, agrees to keep the same occupied and cared for, the same as if he was the owner."

At the time the deed was executed there was, upon the south part of the land, a brickyard, with machinery and sheds worth about \$800.00, also a clay bed already opened. The brickyard and clay bed were adapted to the business of brick making and the land was unfit for any other use.

Soon after the execution of the deed mentioned above, the railroad company constructed its tracks across the land, and made it impracticable, as appellee claimed, to run the brick yard, and for this alleged invasion of the rights of the appellee, this suit was brought to recover damages.

Upon the issues joined there was a trial by jury and a verdict for the appellee, and over appellant's motion for a new trial judgment was rendered on the verdict.

The only error assigned is the overruling of the motion for a new trial.

The first and second reasons in the motion for a new trial, namely, that the verdict of the jury is not sustained by sufficient evidence and is contrary to law may be considered together. These reasons for a new trial require a construction of the deed conveying the land in question by the appellee to the appellant.

The deed in question was under consideration in

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this court when this case was here on a former appeal. *Waldorf v. Elkhart, etc., R. R. Co.*, 13 Ind. App. 134. In that case the court said: "The trial court seems to have disposed of the case upon the theory that under the provisions of the deed appellant had no right to dig up the clay for brick.

"Counsel for the appellee are of the opinion that the truth of this proposition is self-evident and needs no authority. With this view we are unable to agree.
* * *

"In this case it was clearly the intention of the parties, as expressed in the deed, that the grantor was to have, not only the naked possession, but the use and enjoyment of the land, and that certainly included the right to use it for a brick yard and to dig the clay from the opened pit, these being essential to the use of that portion of the land for the only purpose for which it was fitted."

We think that by the terms of the deed the intention of the parties is manifest, that at the time the deed was made there should be a limited reservation in the deed in favor of the grantor, and that there should be a limitation on, and an exception out of that limited reservation. That is to say, the grantor's reservation of the right of possession to the south half of the land for two years was limited by the right of the railroad company to take possession for railroad purposes within the two years, of all or any portion of the land except that part of the land occupied by the brick yard. The possession of that part of the land occupied by the brick yard was reserved absolutely for two years, and the possession of the rest was reserved for two years, unless the railroad company wanted it within that time for railroad purposes.

It is earnestly insisted by appellant's counsel, that the reservation in the deed was not construed on the

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former appeal. The point in controversy is, what do the words "occupied by said brick yard" mean, when taken in connection with the whole instrument, and what part of the land would that expression include?

We think the language used in the opinion, on the former appeal, and as set out above, is a construction of the deed in question, and whether that construction be right or wrong, it is the law on this appeal. *Linton Coal, etc., Co. v. Persons*, 15 Ind. App. 69.

The third and fourth grounds for a new trial were, that the damages assessed were erroneous and excessive. The jury gave appellee a verdict for \$1,500.00, but a remittitur for \$750.00 was entered and judgment rendered for the balance.

Under the construction that has been placed upon the deed the appellee was entitled, under the reservation, to mine clay on the premises for two years. There is evidence in the record that, before the railroad was built, the land, where the brick yard and clay beds were located, was worth nothing, except for brick yard purposes, and that the value for that purpose for two years was \$3,000.00, and that after the railroad had built its track across the clay beds the land was worthless as a brick yard; that the fair rental value for the two years of the brick yard and clay beds at the time the road was built was from \$1,000.00 to \$1,500.00 per annum, and that after the railroad was built the land had no rental value as a brick yard.

If the appellee was injured by the construction of the railroad across the beds, and was entitled to damages therefor, he was entitled to recover in one suit all damages that flow from the wrongful act of the railroad company. If the act done is necessarily injurious, and is of a permanent nature, the party injured may at once recover his damages for the whole

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injury. 1 Sedg. on Damages (8th ed.), section 94, 95; 3 Sedg. on Damages (8th ed.), section 924; Pierce Railroads, 229, 230; *Strickler v. Midland R. W. Co.*, 125 Ind. 412.

It is well settled, by numerous decisions in this State, that courts will not interfere with the verdict of a jury on the ground of excessive damages, unless they are, as said by Chancellor Kent, "so outrageous as to strike everyone with the enormity and injustice of them, and so as to induce the court to believe that the jury must have acted from prejudice, partiality and corruption." *Lake Erie, etc., R. W. Co. v. Acres*, 108 Ind. 548; *Louisville, etc., R. W. Co. v. Falvey*, 104 Ind. 409, and cases cited; *Ohio, etc., R. W. Co. v. Judy*, 120 Ind. 397; *Kelley v. Kelley*, 8 Ind. App. 606.

We cannot say that the damages assessed in this case appear at first blush to be outrageous or excessive.

Appellant says, in his brief, that the questions raised by the assignment of the fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth grounds for a new trial are each and every one of them well assigned, if the construction which appellant insists should obtain in reading the deed as reformed is correct. But as appellant's construction of the deed did not obtain on the former appeal, it is not necessary to notice further these several grounds for a new trial.

The sixteenth ground for a new trial was predicated upon the refusal of the court to permit the appellant to prove by a certain witness, Dryhuff, who had made a careful examination by drilling, that there was no clay within fifteen feet of the surface at any point touched by the line of the railroad, or in any manner interfered with by establishing the tracks. The wit-

ness had already testified in detail about a number of borings he had made on the land, and as to the result of such borings, whether or not he found clay, and if so how deep it was under the surface, thickness of the strata, location, and in fact all about the tests he had made. The question asked simply called for an opinion of the witness whether, from the tests he had made, there was or was not any clay within a certain depth below the surface. The witness had already detailed to the jury all the knowledge he had on the subject.

In the case of *Brunker v. Cummins*, 133 Ind. 443, Elliott, J., speaking for the court, said: "It is safe to assume at the outset, that where the facts can be fully placed before the jury, opinion evidence, even from experts, is incompetent if the facts are of such a nature that jurors are as well qualified to form an opinion upon them as the witnesses." *Connecticut, etc., Ins. Co. v. Lathrop*, 111 U. S. 612; *Milwaukee, etc., R. R. Co. v. Kellogg*, 94 U. S. 469.

In this case, there was no necessity for the evidence called for by the question, for the facts embodied in the question had already been given to the jury, and an opinion could have been readily formed by the jury upon the facts which the witness had already given them. Nor is it shown by the record that the witness was competent to testify as an expert on the subject of clay, suitable for brick making. *Toledo, etc., R. R. Co. v. Jackson*, 5 Ind. App. 547.

Whether or not it would be competent for one of the parties to the deed to explain what might appear to be an ambiguity in the instrument, by giving a conversation had with the other contracting party, at the time the deed was made, is immaterial on this appeal, as the construction placed on the deed on the former appeal is binding.

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When a witness is asked to give a conversation had at some previous time with another person, he must give the conversation as it occurred, or the substance of it, and leave the court or jury to determine what the parties intended.

The twentieth reason assigned for a new trial was the giving of instruction number two. This instruction is framed in accordance with the construction placed upon the deed when this case was here on the former appeal, and according to the interpretation then given the deed, it correctly stated the law.

The sixth instruction was on the measure of damages. In this instruction the jury was told, that although this suit was commenced before the expiration of appellee's reservation of two years, the appellee might recover in this suit his damages for the whole injury done him. That is, if the jury found that the construction of the railroad was over the clay pits, or beds, opened by appellee, that these clay beds were essential to the use of that south half reserved, and that thereby the value of the brickyard for use was wholly destroyed, and that this was the only use for which the land was fitted, then the measure of damages is the total value of plaintiff's interest; and if the injury was only partial, then the value of the partial interest destroyed is the measure of damages. We think this instruction correctly stated the law as to the measure of damages. It was based upon the construction of the deed, binding on the lower court.

We find no error in the record for which the judgment should be reversed.

Judgment affirmed.

Board of Com'rs of Allen County v. Fort Wayne Water Power Co.

BOARD OF COMMISSIONERS OF ALLEN COUNTY v. THE
FORT WAYNE WATER POWER COMPANY.

[No. 2,011. Filed February 4, 1897.]

WABASH AND ERIE CANAL.—*Judicial Notice.*—The courts will take judicial notice of the history of the Wabash and Erie Canal, and the legislation relating thereto.

SAME.—*When the Duty of Purchaser of Canal to Maintain Bridges.*—The burden of maintaining a bridge over a feeder of the Wabash and Erie Canal, which bridge forms part of a public highway that existed prior to the construction of the canal, rests upon the purchaser of the canal and not upon the county.

From the Allen Circuit Court. *Reversed.*

Walpole G. Colerick and William E. Colerick, for appellant.

Robert S. Taylor, for appellee.

COMSTOCK, C. J.—This action was brought by appellant, in the Allen Circuit Court, to recover from appellee the cost of a bridge which appellant constructed across one of the feeders of the Wabash and Erie Canal, then and now owned by appellee, and which bridge appellee refused to construct, although notified so to do by appellant before its construction. The only question is, whether, upon the facts stated in the complaint, the appellee is legally bound, as owner of the feeder, to keep up bridges across it, at the intersection of highways. The court sustained a demurrer to the complaint, and this appeal is from that ruling.

The complaint, in substance, alleges that the defendant, the Fort Wayne Water Power Company, is a corporation, organized August 23, 1888, under the laws of the State of Indiana, authorizing the incor-

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poration of manufacturing and mining companies; and that the object of its formation, as recited in its articles of association, was, and is to furnish motive power for all kinds of manufacturing, mining, and mechanical purposes; that on the 15th day of October, 1888, the defendant, for the purpose of enabling it to carry on its business, acquired, by purchase and conveyance, the title to, and possession of one of the feeders of the Wabash and Erie Canal, located in Allen county; that said feeder was, and is an artificial channel, many feet in width and depth, and by and through which channel water used by the defendant for its said business is conveyed from the St. Joseph river, in said county, and in and through which channel, water so conveyed from said river is always flowing; that the defendant, ever since October 15, 1888, has been and is still the owner of said feeder and in the exclusive possession of the same, for the purposes of its business, and that the same is maintained and used for no other purpose whatever; that, at the time the defendant so purchased and took possession of said feeder, a bridge that constituted a part of the public highway in said county, and which crossed said feeder, existed, and which highway was existing at the time of the construction of said feeder; that said highway, which then was, and still is a county road, had existed for many years prior to said time, and had been, and ever since said time has been, extensively used by the public as a highway; that said bridge is an indispensable part of said highway, and, in the absence of such bridge at said point, said highway could not be used by the public as a highway; and that under the provisions of an act of the General Assembly of this State, approved January 27, 1847, it was made the mandatory duty of the trustees of said Wabash and Erie Canal to erect and keep in repair

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suitable bridges over all State and county roads crossing, or that might thereafter cross said Wabash and Erie Canal, including said feeder; that the duty so imposed upon said trustees has devolved upon the defendant ever since it became the owner of said feeder, and is a burden which the defendant assumed and must bear, by reason of the defendant's purchase of said feeder with said bridge then existing across the same, as aforesaid, and by the defendant taking the actual and exclusive possession of said feeder and maintaining the same in connection with its said business and solely for its own private benefit and use; that the defendant permitted said bridge to become out of repair to such an extent as to render it a public nuisance, and its use by the public as a part of said highway is unsafe; that by reason of its unsafe condition, it became the duty of the plaintiff, as such board of commissioners, to cause said bridge to be repaired, and appellant, in the discharge of its duty, after having given appellee reasonable notice to make the repair, and it had failed to do so, caused a new bridge to be constructed over and across said feeder, at the place where said old bridge existed, and which new bridge was absolutely essential to render the use of said highway, at said place, by the public, safe; and that said old bridge, by reason of its decayed condition, could not be otherwise repaired; that the reasonable expense incurred by plaintiff in causing said bridge, which was in all respects a proper, suitable, and necessary one, to be constructed, was \$1,156.00; and afterwards the plaintiff demanded of the defendant said sum, but the defendant refused and still refuses to pay the same or any part thereof.

The court will take judicial notice of the history of the Wabash and Erie Canal, and the legislation relating to the same.

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By the sale of the canal and its appurtenances, under the order of the United States Circuit Court, the title to that part of the canal lying in Allen county, with the feeder and its appurtenances, passed to William Fleming, as a purchaser at the sale, and from him by *mesne* conveyances to the appellee, who at the time of the construction of the bridge in question was the owner in actual possession. The title so acquired was a fee simple. See *Nelson v. Fleming*, 56 Ind. 310; *Water Works Co. v. Burkhardt*, 41 Ind. 364; *Blair v. Kiger*, 111 Ind. 193; *Frank v. Evansville, etc., R. R. Co.*, 111 Ind. 132.

The feeder was a part of the canal. Acts 1846, p. 15, section 23. The feeder has been abandoned for canal purposes,—it is, as averred in the complaint, now only maintained and used by the appellee for private purposes. That it was the duty of the board of commissioners of Allen county to see that the bridges of the county were kept in repair is not questioned. The complaint alleges that the highway, of which the bridge formed an indispensable part, was, at the time of the construction of the feeder, and still is a county road; that it had so existed and been extensively used by the public as a highway for many years before the construction of the said feeder.

Appellee's counsel, in his able brief, states the rule at common law to be that, "When a way of any kind is laid across an existing highway, and a bridge is necessary for a continued use of the highway, the party locating the latter way, whether it be a railroad, canal, mill race, or what not, is bound to build and maintain the bridge; but if the highway is located across an existing way of any sort, the public must maintain the bridge. In other words, the rule is: 'First in time, first in right.'" Citing *Lowell v. Proprietors Locks and Canals*, 104 Mass. 18; *Inhabitants*

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of *Woburn v. Henshaw*, 101 Mass. 193; *Dygert v. Schenck*, 23 Wend. 446; *Morris Canal, etc., Co. v. State*, 24 N. J. L. 62. These decisions fully sustain the proposition.

It will follow, therefore, that the owner of the feeder is bound to maintain a bridge over it at the crossing of the highway, unless that duty has been imposed by some express provision of law upon another.

In 1835, the State located, and afterwards constructed the Wabash and Erie Canal.

Section 28 of an Act of the General Assembly of the State of Indiana, approved January 19, 1846 (Acts 1846, p. 16), "An act to provide for the funded debt of the State of Indiana and for the completion of the Wabash and Erie Canal to Evansville," reads as follows:

"The capacity of that portion of said canal yet to be finished, shall be the same as established and provided in the original and late surveys, and the said trustees shall cause to be constructed and kept in repair, on the entire line of said canal, suitable bridges, over all State and county roads, crossing the same, in the same manner as is now required on the line of said canal east of Tippecanoe."

Section 30 of an Act of the General Assembly of the State of Indiana, supplementary to said act of January 19, 1846, approved January 27, 1847 (Acts 1847, p. 33), reads as follows:

"And be it further enacted, That the said trustees shall erect, construct, and keep in good repair, suitable bridges over all State and county roads, crossing, or that may hereafter cross said Wabash and Erie Canal."

Thus, under both acts from which these sections are quoted the State assumed the burden of constructing

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and maintaining in good repair all bridges over all the county roads crossing the canal, without regard to the order in time of the construction of either the road or canal.

The Supreme Court, in *Lowrey, Admx., v. City of Delphi*, 55 Ind. 250, held, that the act of 1847, *supra*, did not impose on the trustees of the canal the duty of constructing and maintaining bridges in towns or cities, but did not question that such duty rested on them as to bridges on State and county roads.

In *Shirk v. Board, etc.*, 106 Ind. 573, the court held that the sale of the Wabash and Erie Canal and its appurtenances under the decree of foreclosure against the State carried to the purchaser the fee simple therein, subject to the burden of any easement of the public of which he was bound to take notice, Elliott, J., speaking for the court, said: "But, while the appellants acquired all the estate of their remote grantor, the State of Indiana, in the canal and its appurtenances, they acquired nothing more. If the estate which they acquired was burdened with any charge or easement which was open to view and was one which the appellants were bound to take notice of, then it remains subject to that burden in their hands. It is not essential that a grantee should have actual knowledge of the burden, for it is a familiar doctrine, that one who has means of knowledge is presumed to have knowledge." So that, so far from being relieved from these obligations imposed by the common law, the obligations have been formulated into statutes and interpreted by the Supreme Court.

The purchaser acquired the rights of the State, but he and his grantees took the property subject to its burdens. He and they must be charged with a knowledge of the duties assumed by the State and cast upon the trustees as to the maintenance of bridges.

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It cannot be said that if the purchaser was under no obligations to maintain feeders, locks, etc., it was not his duty to maintain bridges. The operating of the canal was a matter in his exclusive control, relating to his private interests. The public has rights in the highway; as to it, with reference thereto, he could not relieve himself of a burden which the law had imposed.

Counsel for appellee cites three cases decided by the Supreme Court of Pennsylvania, in which the question before the court was whether the buyer of a canal from the state took it charged with the burden of maintaining bridges over the highway crossings. In all the cases, the state had kept up the bridges while it owned the canal.

In the first case cited, *Meadville v. Erie Canal Co.*, 18 Pa. St. 66, the law required the canal company to keep up all *farm* bridges, but said nothing about highway bridges. The court held that the act by confining the duty of the company to maintaining farm bridges made it clear that the legislature intended to exempt the company from the duty of repairing public bridges.

In the second case, *Penn. R. R. Co. v. Duquesne Borough*, 46 Pa. St. 223, the court says: "The jury have found that this canal bridge is one of those erected by the state when the canal was made; that it still continues to be necessary for the accommodation of the public; that after its fall the defendants below, the railroad company, now owning the canal, was notified to rebuild it and refused, and that thereupon it was rebuilt by the corporate authorities of Duquesne Borough, where the bridge is; and they have brought this suit for the expense of the work. Was the railroad company bound to rebuild the bridge?

"We think it was. It took the public works and

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their 'appurtenances, subject to all contracts and arrangements heretofore made by Act of Assembly or otherwise, for and in respect to the use of such works,' and was required to 'carry out the same with all persons interested therein, in the same manner as the Commonwealth or its agents are now required to do by law.' And we do not think that it is putting any undue strain on the language to make it include canal bridges that are necessary for the public, and which the state had assumed the burden of building and maintaining; for when a county road is cut by a canal, and reconnected by means of a bridge over the canal, such a bridge is an arrangement with the road 'in respect to the use of the canal,' though it is also a part of the road and necessary to *its* use."

In the third case, *City of Erie v. Erie Canal Co.*, 59 Pa. St. 174, it was held that the canal company was not obliged to repair highway bridges, when that duty was not imposed upon it by the law vesting its title in the canal, notwithstanding the legislature had subsequently undertaken to impose the duty. The court says: "There are two questions which must be considered to have passed *in res judicatas*. The first is that where the state has made a grant of a public work to a corporation, the grantees are discharged from those duties to the public growing out of the work which the State has been accustomed to perform before the grant, unless there are express words in the transfer imposing those duties on the corporation. The second is that the charter of the Erie Canal Company does not impose upon the company the duty of making or keeping in repair public bridges connecting highways intersected by the canal: *Pennsylvania Railroad Co. v. Duquesne Borough*, 10 Wright 223; *Meadville v. The Erie Canal Co.*, 6 Harris 66. * * *

"When this court, therefore, decided in *Meadville v.*

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Erie Canal Company, that the clause in the charter imposing on this company the duty to make and keep in repair all farm bridges and causeways on the line of the canal meant 'farm bridges and causeways,'—*expressio unius est exclusio alterius*—it followed by a logical sequence that they were under no obligation to make and keep in repair public bridges and causeways; and another consequence inevitably followed, that the legislature could not without their consent impose such duty upon them, for that would be for one of the parties without the other to insert a new term in the contract."

The first, in the order in which these cases are cited, limits the duty of the company by the letter of the statute. The second, holds that the railroad took the canal subject to the burdens which the State had assumed, among these, the maintenance of bridges. It is a case not to be distinguished from the one at bar. The third, holds that when a grant is made by the state of a public work, the grantees are discharged from those duties which the state has been accustomed to perform before the grant, unless there are express words in the transfer imposing those duties on the corporation.

In view of the language of the acts of 1846 and 1847, and the obligations imposed by the common law, with the averment in the complaint that the highway was older than the canal, there is nothing inconsistent in these decisions with the conclusion, that the burden of maintaining the bridge in question is upon the appellee.

Judgment reversed, at appellee's costs, with instructions to the court below to overrule the demurrer to the complaint.

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BROWNING ET AL. V. SIMONS ET AL.

[No. 2,269. Filed February 5, 1897.]

ASSIGNMENT OF ERROR.—Breach of Contract.—Measure of Damages.

—In an action by vendors against vendees for damages for failure and refusal to receive a certain number of books as contracted for, such contract providing that the books should consist of five different styles of binding, ranging in price according to style of binding, and such contract was silent as to the style of binding which vendees agreed to purchase, an assignment that the court erred in overruling appellants' motion on the special verdict in their favor for \$214.50, such amount being based upon the assumption that vendees were to order and receive an equal number of the five different styles of binding, is too indefinite to present any question thereon. *pp.* 50–52.

CONTRACT.—Breach Of.—Measure of Damages.—Where a contract is made for the sale and delivery of personal property and the vendee refuses to receive the same at the time and place of the delivery thereof, the measure of damages is the difference between the contract price and the market value at such time. *p.* 52.

SAME.—Breach Of.—Nominal Damages.—Where there has been a breach of contract by one of the parties thereto, the other is at least entitled to recover nominal damages for such breach. *p.* 53.

APPEAL AND ERROR.—Nominal Damages.—Harmless Error.—The Appellate Court will not reverse a judgment of the court below for its failure to assess nominal damages. *p.* 53.

From the Huntington Circuit Court. *Affirmed.*

M. L. Spencer and *W. A. Branyan*, for appellants.

J. B. Kenner, *U. S. Lesh* and *J. M. Hatfield*, for appellees.

WILEY, J.—Appellants sued appellees, William Simons and Josiah H. Simons, for an alleged breach of a written contract. The substance of the contract, which is made a part of the complaint, is that appellants employed appellees as agents to sell by subscription certain books, published by appellants; that said agency was for a term of one year; that appellees were to order and sell during the year 600 copies of

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a book "known as the Illustrated New Testament, with notes;" that they were to pay cash for the books as ordered; that they were to have the books at fifty per cent. of the regular subscription price, and devote their entire time to selling them. The contract also specifies the territory in which they are authorized to canvass. The breach of this contract, of which the appellants complain, is stated in their complaint in the following language: "Plaintiffs aver that defendants ordered, under and in pursuance of said contract, one hundred and fifty-six books, the price of which they paid, except \$14.21, which, with interest thereon since 1889, remains unpaid. plaintiffs further aver that the remaining 444 books of the 600 so sold under said contract, the defendants failed and neglected, and still fail and refuse to take or pay for. Plaintiffs aver that it has had on hand, and had, during the year said contract was to run, all of said 600 books, subject to defendants' order and ready to be delivered, and has done all and singular the things required by said contract, and that by reason of defendants refusing to perform their part of said agreement, plaintiffs have been damaged," etc.

With the complaint and attached thereto, is a bill of particulars, as follows:

TOLEDO, OHIO, Sept. 30, 1895.

MESSRS. WM. and J. H. SIMONS:

Bought of O. A. Browning & Co., Book Publishers and Manufacturers.

Terms _____.

444 New Testaments, our damage by breach of	
contract, 1.77 1-2.....	\$788.10
Balance due on account.....	14.21
Interest to be added since 1890.....	_____
Total	\$802.31

Incident to the main action, there was a proceeding in attachment and garnishment, and John H. Simons and Alfred S. Gooden were made garnishee defendants; but as no question is presented by the record for our decision upon that branch of the case, we will not notice it further.

Appellees, William and Josiah H. Simons, answered in four paragraphs.

1. General denial.

2. That appellants and one S. A. Shoemaker entered into a contract, by the terms of which it was agreed that appellees were released from all the conditions imposed upon them by their contract with appellants, and that said Shoemaker was substituted for appellees, and that said Shoemaker undertook to sell the books for the appellants instead of appellees, and that they were released by appellants from any further liabilities under their said contract.

3. That under their contract, with appellants, they were to have the exclusive right to sell the books described therein in the county of Allen, in the State of Indiana, during said time; that after said contract had been entered into and before its expiration, appellants, in violation of its terms, entered into a contract with one Shoemaker, and permitted him to sell said books in said county; that said Shoemaker did so sell, and appellants accepted the price therefor, and that appellants, by said action, violated their said contract with appellees and released them from any further obligations thereunder.

4. That by the terms of said contract they were to have the exclusive right to sell appellants' books in Allen county; that after its execution, and before its expiration, appellants and one Shoemaker entered into a contract, by the terms of which said Shoemaker was permitted to sell appellants' books in said county;

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that appellees acquiesced in said contract on condition and with the agreement that appellants would release them from the sale of 300 books; that appellants so agreed, and was to give them credit on their contract for the sale of said number of books; that appellants thereafter refused to release appellees from the sale of said 300 books; that appellees offered to buy of appellants the difference between the number of books they had sold and 300 on condition that appellants would give them credit on the contract for the 300 they had agreed to do; that they refused and violated their said contract and agreement, and that appellees were thereby released from any further liability, etc.

The appellants did not demur to these affirmative answers, but replied by general denial, and upon the issues thus joined, trial was had by jury, and upon proper request and instructions of the court, a special verdict was returned. Such other proceedings were had as that judgment was rendered for appellees. Appellants have assigned errors as follows:

1. That the court erred in overruling appellants' motion for judgment on the verdict in their favor.

2. That the court erred in overruling appellants' motion for judgment on the verdict in their favor for \$214.50.

3. The court erred in sustaining motion by appellees for judgment on the verdict in their favor.

The first assignment of error presents no question for our decision, for the reason that the record does not show that appellants below made any general motion for judgment in their favor, upon the special verdict. The only motion made by them was in writing, and was in the following words and figures: "The plaintiffs move the court for judgment in their favor in the sum of \$214.50," and the action of the court in

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overruling this motion is properly presented in the second assignment of error. Before discussing the question thus raised, and to the end that it may be clearly presented, it is necessary to look to the special verdict for the facts upon which the motion was predicated.

The pivotal facts, as found and stated by the jury, are as follows:

That appellees ordered and received from appellants 156 books, described in the contract; that they did not neglect to order any more books; that appellants refused and neglected to give appellees credit for 300 books as they agreed to do; that appellants had in stock sufficient books to fill their part of the agreement; that appellants were at all times ready to deliver the books described to appellees; that the average price of the books was \$2.65; that plaintiffs, on the recommendation of appellees, employed one Shoemaker, as their agent, to sell their books; that plaintiffs released appellees from selling or ordering 300 of said books, by their contract and agreement with Shoemaker; that appellees were not indebted to appellants in the sum of \$14.21, on account of books sold; that appellees sold 175 books, under their contract; that appellees had the exclusive right to sell said books in the counties of Allen, Noble and Elkhart, and in the township of Etna, in Whitley county, from October 10, 1889, to October 10, 1890; that during said time appellants made a contract with one S. A. Shoemaker to sell like books in the same territory, viz.: the county of Allen, except Aboite township; that by said contract said Shoemaker was to sell 300 copies of said book; that in consideration of appellees releasing the territory in Allen county, to said Shoemaker, appellants agreed to release them from selling 300 of said

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books and to give them credit on their contract therefor; that of the 600 books appellees agreed to sell, there remained unordered by them 125; that by reason of appellees failing to order and receive the entire 600 copies of said books appellants did not sell any of said copies at a less price than the prices appellees were to pay under their said contract; that appellants did not suffer any loss on account of the resale of any of the books that appellees agreed to purchase; that the market price of the books sold by appellees for appellants was the same from June 16, 1890, to the time of the commencement of the action herein; that appellees were to pay for said books, less fifty per cent., the following prices: one price, \$4.25; second price, \$4.75; third price, \$5.25; fourth price, \$5.75; and fifth price, \$6.50; that the value of the copies of the books described in the contract, at the time appellees refused to make further orders, estimating an equal number of each style, was \$116.75.

Upon these facts as set out in special verdict, appellants based their motion for judgment in their favor for \$214.50. This motion is vague, indefinite, and uncertain, and it is difficult for us to understand its full import. It will be observed that the facts found by the jury are in some respects conflicting and inconsistent, but taking the facts and construing them together, we take it that appellants based their motion for judgment for a specific sum on the following interrogatories in the special verdict, viz.:

"16th. Was the average price of single copies of the books described in query No. 1, which defendants agreed to pay, \$2.65? Ans. Yes.

"17th. Was the value of the copies of the books described in query No. 1 [and we should say here that 'query No. 1' was the one wherein the jury was asked and found in their answer that the contract de-

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scribed in the complaint was made between appellants and appellees], at the time defendants neglected and refused to make further orders, estimating an equal number of each style of binding, \$410.70? Ans. No.

“18th. If the value inquired for in the next preceding inquiry was not \$410.70, what was the value of said books? Ans. \$116.50.”

And in the second set of interrogatories, these questions:

“9th. Did any balance of the 600 books, which the defendants agreed to order, remain unordered by them prior to the 10th day of October, 1890? Ans. Yes.

“10th. If you answer the foregoing question yes, state how many? Ans. 125.”

Appellants go upon the assumption that appellees were to order from appellants an equal number of each of the five different styles of binding described in the contract, and conclude, therefore, as there were 125 books that appellees, under their contract, had not ordered, and as the average price of the books was \$2.65, the appellants, under the facts found, were entitled to recover the agreed price, which would be \$331.25, less the actual value, which was \$116.75, which would leave \$214.50, the amount for which they moved for judgment in their favor.

We do not think this theory of appellants is tenable, for two reasons:

1. It does not state a correct measure of damages for a breach of contract of the character sued upon.

2. The contract does not provide that appellees shall order or purchase an equal number of each style of binding, but is silent upon the question, and it can not be assumed, or presumed, in the absence of facts

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to the contrary, that they either would or were compelled to so order.

In the case of *Shover v. Jones*, 32 Ind. 141, is found an assignment of error as follows:

"1st. The court erred in finding for, and rendering judgment for, defendants, when said finding and judgment should have been for the plaintiffs." The court said: "The first error assigned is too indefinite to present any question upon the record to this court."

It clearly appears, from the record, that appellants based their right of action upon the theory, that they were entitled to recover from appellees the contract price of the 444 books, which they aver were not ordered by appellees, and having adopted this theory they are bound by it. This principle in jurisprudence is so familiar that citations of authorities are unnecessary.

The rule is well settled, that for a breach of contract for the sale and purchase of personal property, the measure of damages is the difference between the contract and the market price of the article at the time of the breach. This doctrine is elementary and finds a place in the text books. *Sutherland on Damages*, sections 46-52.

In New York the rule is thus stated: "The measure of damages for breach of contract to sell and deliver, is the difference between the contract price and the market price at the time and place of delivery." *Reeve v. Gallivan*, 89 Hun. 59.

The rule as to the measure of damages for a breach of a contract similar to the one sued upon, may be briefly, yet we think clearly stated as follows: Where a contract is made for the sale and delivery of personal property and the vendee refuses to receive the same at the time and place of the delivery thereof, the measure of damages is the difference between the con-

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tract price and the market value at such time. *Pittsburgh, etc., R. W. Co. v. Heck*, 50 Ind. 303, 19 Am. Rep. 713; *Fell v. Muller*, 78 Ind. 507; *Dwiggins v. Clark*, 94 Ind. 49; *McComas v. Haas*, 107 Ind. 512; *Neal v. Shewalter*, 5 Ind. App. 147; *Rahm v. Deig*, 121 Ind. 283.

But it is useless to multiply authorities in support of a proposition so firmly settled.

There is no reasonable hypothesis upon which appellants were entitled to a judgment on the special verdict for \$214.50, the specific amount embraced in their written motion, and as appellants did not make any other motion for judgment in their favor, we find no error in the record to warrant a reversal. Under the facts found, at most, the appellants were only entitled to recover nominal damages, for the jury find and state as an ultimate fact, that appellees failed to order 125 of the books, which the terms of the contract bound them to do. This was a breach of the contract on the part of appellees, and the rule prevails that where there has been a breach of a contract by one of the parties thereto, the other is at least entitled to recover nominal damages. *Rosenbaum v. McThomas*, 34 Ind. 331.

The unbroken line of authorities in this State, however, hold that the appellate tribunal will not reverse a judgment for a failure to assess nominal damages. *Patton v. Hamilton*, 12 Ind. 256; *Hacker v. Blake*, 17 Ind. 97; *Black v. Coan*, 48 Ind. 385; *Mahoney v. Robbins*, 49 Ind. 146; *Wimberg v. Schwegeman*, 97 Ind. 528.

Judgment affirmed.

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• WESTERN ASSURANCE COMPANY OF TORONTO
v. KOONTZ.

[No. 2,099. Filed February 16, 1897.]

APPEAL AND ERROR.—*Sufficiency of Complaint First Assailed by Assignment of Errors.*—*Statute Construed.*—The sufficiency of the facts stated in a complaint may be raised for the first time by the assignment of errors in this court under section 346, Burns' R. S. 1894, where the averment of a substantive fact has been entirely omitted therefrom. pp. 55-57.

SAME.—*Defective Complaint not Cured by Verdict and Judgment.*—Verdict and judgment thereon will not cure a defective complaint where the averment of a substantive fact has been entirely omitted therefrom. pp. 57, 58.

INSURANCE.—*Complaint Must Contain Averment as to Ownership of Property.*—*Defect not Cured by Verdict and Judgment.*—The omission from a complaint, in action on a fire insurance policy, of an averment as to the ownership of the property, renders the complaint fatally defective and a verdict and judgment thereon will not cure it, there being no foundation for a valid judgment. p. 60.

From the Madison Superior Court. *Reversed.*

Chambers, Pickens & Moores, for appellant.

W. A. Kittinger and *E. D. Reardon*, for appellee.

HENLEY, J.—This was an action upon an insurance policy issued by appellant, under which policy appellant undertook to insure appellee against loss by fire.

The complaint was in one paragraph, and the sufficiency of the same was not questioned in the lower court by demurrer, primarily directed thereto. To the complaint, appellant answered in five paragraphs. To the second and third paragraphs of answer the lower court sustained a demurrer. The cause was put at issue and tried by a jury. Upon the request of appellant the court ordered the jury to return a special verdict upon all the issues in the cause. Appel-

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lant's motion for judgment upon the special verdict was by the court overruled, and upon appellee's motion therefor, judgment was rendered in his favor. The alleged errors assigned and discussed by appellant's counsel are as follows:

First—That plaintiff's complaint does not state facts sufficient to constitute a cause of action.

Second—That the court erred in sustaining the demurrer of plaintiff to the second paragraph of defendant's answer.

Third—That the court erred in sustaining the demurrer of the plaintiff to the third paragraph of defendant's answer.

Fourth—That the court erred in submitting to the jury over the objection of defendant, certain interrogatories, numbered 11, 12, 13, 24, 36, 37, 41, 42, 43, 44, 45, 46, and 55, and in submitting each of them to the jury over the objections of the defendant.

Fifth—That the court erred in overruling defendant's motion for a judgment against the plaintiff upon the special verdict returned by the jury.

Sixth—That the court erred in overruling the motion of the defendant for a new trial.

Seventh—That the court erred in rendering judgment in favor of the plaintiff against the defendant.

No demurrer having been filed to the complaint in the lower court, the sufficiency of the same is attacked here by the first specification of the assignment of errors. The statutes of this State permit this practice. Section 346, Burns' R. S. 1894. In commenting on the statute Judge Elliott in his work on Appellate Procedure, section 472, says: "In this State the question as to the right to challenge a complaint on appeal for the first time is settled by statute, and settled, as we believe, in accordance with principle. Doubtless the statute is open to abuse, and that result can only be

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prevented by construing it so as to prevent advantage being taken of defects that do not go to the substance. The statute has been before the court in many cases and has been enforced wherever there was no cause of action. It has, indeed, been held, that a complaint may be assailed by the assignment of errors, although a demurrer to it may have been overruled but no exception taken by the trial court, and this holding seems defensible upon the ground that when there is no cause of action there can be no valid judgment."

Counsel for appellant contend that the complaint in this cause is fatally defective, for the reason that there is an entire failure therein to aver any insurable interest or ownership in the plaintiff in the property destroyed, at the time of the fire, and that for this reason the complaint must be held bad, even after verdict and judgment, and when first assailed in this court. No inflexible rule seems to have been established by the Supreme or Appellate Court of this State for determining the sufficiency of a complaint when first assailed by the assignment of errors. The courts have passed upon this question in a large number, and a great variety of cases, and from all these decisions it seems to us that the correct rule deducible therefrom is that the verdict and judgment will not cure a defective complaint, when the question is first raised by the assignment of error in this court, if the averment of a substantive fact has, by the pleader, been entirely omitted therefrom.

Thus it was said in *Dotson v. Dotson*, 13 Ind. App. 436: "When the sufficiency of a complaint is called in question for the first time in this court, the defect in the complaint will be deemed to be cured by the verdict, unless it wholly omits the averment of some material facts essential to the cause of action attempted to be stated." To the same effect are *Lockhart v.*

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Schlotterback, 12 Ind. App. 683; *Plano Mfg. Co. v. Kesler*, 15 Ind. App. 110; *Harter v. Parsons*, 14 Ind. App. 331; *Town of Ladoga v. Linn*, 9 Ind. App. 15.

In the case of *Cincinnati, etc., R. W. Co. v. Stanley*, 4 Ind. App. 364, the court said: "Where there is a failure to plead some independent fact which is essential to a recovery, or to the statement of a substantial cause of action, the omission is fatal, even on a motion to arrest. * * * The verdict will cure all defects in averments except those which are essential to the foundation of the cause of action itself."

In the case of *Mansur v. Streight*, 103 Ind. 358, Mitchell, J., delivering the opinion of the court, said: "This is not the case of an essential averment inaccurately or defectively stated, but one where there is a total omission of a fact essential to the plaintiffs' cause of action. In such cases the omission is not cured by a verdict or judgment."

Again, in *Cox v. Hunter*, 79 Ind. 590, the Supreme Court says: "It is claimed, however, by appellee's counsel, that, as the complaint was not demurred to, it must be held to be sufficient after verdict, for the reason that its omissions were probably supplied by the evidence and cured by the verdict. If the appellee had defectively alleged the necessary facts, such defective allegations might, perhaps, have been cured by the verdict. But where, as in this case, the complaint entirely omits allegations of fact, necessary and material to the maintenance of the suit, such allegations cannot be supplied by evidence, nor can their omissions be cured by the verdict."

To the same effect see *Old v. Mohler*, 122 Ind. 594; *Eberhart v. Reister*, 96 Ind. 478.

It is also the settled law of this State that after verdict the complaint will be supported by every reasonable legal intendment if there is nothing in the

record to prevent it, but the verdict will not supply necessary or material averments entirely absent therefrom. *Parker v. Clayton*, 72 Ind. 307.

The rule that defects in a complaint are cured by verdict should be, and is, very liberally construed, but at the same time if any effect is given to the statute which permits the complaint to be tested for the first time upon appeal, it certainly should be in those cases where the complaint wholly fails to aver some essential fact indispensable to the cause of action. *Cox v. Hunter*, *supra*; *Mansur v. Streight*, *supra*.

The complaint in this cause is in the following words and figures, omitting the formal parts:

"The plaintiff complains of the defendant and says, that defendant is a corporation doing a general insurance business for hire and compensation, and having an office and agents in Madison county, Indiana. That on the 11th day of March, 1893, the plaintiff was the owner of the following described personal property in the city of Alexandria, to-wit: a general stock of liquors, consisting of whiskies, brandies, wines, beer, etc., etc., and certain saloon furniture and fixtures, all contained in the one-story shingle roof frame building and its additions adjoining and communicating, which was occupied by plaintiff as a saloon situated on the west side of Harrison street on lot No. 5, in block No. 1, in Mary A. Hains' addition to Alexandria, Madison county, Indiana. That on said day the defendant in consideration of the sum of \$17.50 paid by plaintiff to defendant as premium, executed and delivered to plaintiff a policy of insurance, a copy of which is filed herewith, marked Exhibit 'A,' and made a part hereof. That on the 31st day of July, 1893, said personal property while still contained in said building, together with said building, was burned and wholly destroyed by fire. That said fire did not

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originate by any act, design, or procurement on the part of the plaintiff. That on the 11th day of August, 1893, the plaintiff gave the defendant due notice and proof of said fire and loss sustained by the plaintiff, and that plaintiff has duly performed all the conditions of said policy on his part to be done and performed. That said personal property so insured by the defendant under said policy and contract of insurance when so burned and destroyed by fire was of the value of \$2,000; that on the — day of —, 189—, the plaintiff demanded of said defendant the payment of said insurance, but said defendant refused to pay same or any part thereof, and still refuses and neglects so to do. That said insurance is long past due and wholly unpaid and there is now due the plaintiff under said policy of insurance the sum of \$500.00 and interest thereon from the — day of —, 189—. Wherefore the plaintiff demands judgment for the sum of \$700.00, and all other proper relief.”

Thus it will be seen, that appellant’s contention, that there was an entire failure in the complaint to allege an insurable interest or ownership in the plaintiff in the property destroyed at the time of its destruction by fire, is correct. The question then arises, was such an averment material and essential to plaintiff’s cause of action and did its omission render the complaint fatally defective.

In the case of *Aurora Fire Ins. Co. v. Johnson*, 46 Ind. 315, the Supreme Court says: “The complaint should allege that the assured had an interest in the property insured, and to what amount, at the commencement of the risk and at the time of the loss.” To the same effect see *Aetna Ins. Co. v. Black*, 80 Ind. 513; *Aetna Ins. Co. v. Kittles*, 81 Ind. 96.

Again, in the case of *Home Ins. Co. v. Duke*, 75 Ind. 535, the Supreme Court says: “The appellee

claims that, if the averment of interest was defective, it was cured by the verdict; but, as to interest at the time of the loss, here was not merely a defective averment; there was no averment."

In the case of the *Indiana Live Stock Ins. Co. v. Bogeman*, 4 Ind. App. 237, this court, we think, settled this contention adversely to appellee herein. In that case Black, J., delivering the opinion of the court said: "The appellee's complaint upon this policy stated the death of the horse on the 15th of July, 1890. It showed that the appellee was the owner of the horse at the date of the contract of insurance, but it wholly failed to show that he owned it or had any interest in it at the time of its death. Therefore, the complaint lacked a material and necessary averment."

It was certainly essential in this cause for appellee to aver and prove ownership of the property insured by appellant at the time of the fire and loss. Under the allegations of the complaint, the averment of ownership at the time of the loss being entirely omitted therefrom, evidence showing such ownership at the time of the alleged loss would not be admissible. This averment being necessary to plaintiff's (appellee's) cause of action, and it being wholly omitted, renders his complaint fatally defective and a verdict and judgment rendered thereon will not cure it, there being no foundation for a valid judgment. The complaint being bad it was error for the lower court to sustain appellee's demurrer to the second and third paragraphs of defendant's (appellant's) answer. *Indiana Live Stock Ins. Co. v. Bogeman, supra*; *Batty v. Fout*, 54 Ind. 482; *Corporation of Bluffton v. Mathews*, 92 Ind. 213; *Aetna Ins. Co. v. Black, supra*.

The Supreme Court, in the last mentioned case, says: "A demurrer to an answer reaches back and tests the sufficiency of the complaint. And if the complaint

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is bad it makes no difference whether the answer is good or bad. A bad answer is good enough for a bad complaint.”

In the case of the *Corporation of Bluffton v. Matthews, supra*, the Supreme Court says: “The appellant has assigned as errors: *First*. That the complaint does not state facts sufficient to constitute a cause of action; *Second*. That the court erred in sustaining the demurrer to the second paragraph of answer; and, *Third*. That it erred in overruling the motion for a new trial.

“It is not needed that we should determine whether the complaint should be regarded as sufficient, if the question as to its sufficiency were first raised after verdict. Under the second specification in the assignment of errors the judgment must be reversed, if the complaint was not good on demurrer for want of sufficient facts.” We have quoted fully from the last mentioned case on account of the similarity of the questions presented therein to the questions presented by appellant’s second and third specification of his assignment of errors. To the same effect and under similar conditions (no demurrer having been filed to the complaint) is the case of *Batty v. Fout, supra*. Having held that appellee’s complaint was bad, it is unnecessary for us to decide any other question arising under the assignment of errors.

The judgment is reversed at the appellee’s costs and the cause is remanded with leave to the appellee to amend his complaint and for further proceedings in accordance with this opinion.

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CONBOY v. THE RAILWAY OFFICIALS AND EMPLOYES'
ACCIDENT ASSOCIATION.

[No. 1,720. Filed February 17, 1897.]

ACCIDENT INSURANCE.—*Death While Engaged in an Unlawful Act.*—

Answer.—In an action on an accident insurance policy exempting the company from liability for death of insured while engaged in any unlawful act, an answer attempting to set up as a defense a violation, by the insured, of a statute forbidding seining in streams where the water is above tidewater, which answer fails to allege that the seining was at a point in the stream where the water was above tidewater, is insufficient on demurrer. *p. 66.*

SAME.—*Death During Violation of Law.*—That death ensues during the violation of a statute does not absolve an accident insurance company from liability under a provision of the policy exempting the company from liability if death results from an unlawful act, unless it appears that the act was one which increased the risk, and one between which and the death there was a causative connection. *p. 66.*

SAME.—*Voluntary Exposure to Danger.*—*Answer.*—In an action on an accident insurance policy exempting the company from liability for death of insured, resulting from a "voluntary exposure to unnecessary danger or perilous venture," an answer alleging that deceased at the time of his death was seining in the swift current of a river in which there were sudden step-offs or holes, and that he could not swim, and that he stepped into one of such holes and was caught up by a swirl or eddy and was drowned, but which answer fails to allege that the deceased knew of the dangers and voluntarily exposed himself thereto, is not sufficient on demurrer. *pp. 68, 69.*

From the Marion Superior Court. *Reversed.*

W. A. Pickens and L. A. Cox, for appellant.

Finch & Finch, for appellee.

BLACK, J.—The appellant by her complaint sought to recover upon the appellee's policy whereby it was

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agreed to pay the appellant as beneficiary \$1,000.00 in the event of the death of Cornelius Horan resulting from physical bodily injury, inflicted by external, violent and accidental means during the period of one year from October 6, 1891.

In the complaint it was alleged that said Cornelius Horan was drowned on the 3d of June, 1892, "by accidentally slipping and falling into a deep hole in ——— river, in the county of ———, State of Texas, from which place and deep water said Cornelius Horan was unable to swim or in any manner proceed, or to keep his head above water, though he diligently tried so to do," etc.

The appellee answered in three paragraphs. The first was a general denial.

The policy referred to and made part of the contract contained certain conditions printed on the back thereof, among which were provisions that the insurance should not cover "death or injury resulting from accident attributable partially or wholly, directly or indirectly, by or in consequence of * * * voluntary exposure to unnecessary danger or perilous venture, * * * or injuries or death while being engaged in any unlawful or vicious act."

The second paragraph of answer set up said provision of the contract relating to "injuries or death while being engaged in any unlawful or vicious act," and alleged that said Cornelius Horan at the time of his death was engaged in an unlawful and vicious act, in this; that it is provided in the statute laws of the state of Texas, wherein said Horan came to his death, as follows: Willson's Tex. Cr. St., article 510: "No person shall throw, drag, or haul any fish net, seine, or other contrivance for the purpose of catching fish (except the ordinary pole, line, and hook, or trot line) in any stream, lake, or pool of water within the state,

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not his own, above tidewater, between the first day of February and the first day of July of each year; and at no time of the year in such waters shall any one be permitted to drag or haul any fish net or seine with meshes less than two and a half inches square; and any one violating the provisions of this article shall, upon conviction, be fined in a sum of not less than five nor more than fifty dollars." It was alleged that this statute was in full force and effect on and before the death of said Cornelius Horan; that at the time of his death, on the 3d of June, 1892, he "was engaged in throwing, dragging or hauling a fish net or seine in the ——— river, in the county of ———, state of Texas, at a place not owned by him or any of his companions."

The third paragraph set up said provision relating to death or injury resulting from or attributable partially or wholly, directly or indirectly, by or in consequence of voluntary exposure to unnecessary danger or perilous venture; and it was alleged that the death of said Cornelius Horan was the result, or was attributable partly or wholly, directly or indirectly to and in consequence of his engaging in a perilous venture and to voluntary exposure to unnecessary danger in this; that on the 3d of June, 1892, he, together with a number of others, was engaged in throwing, dragging or hauling a fish net or seine in the ——— river, in ——— county, state of Texas; that said river was very swift and full of sudden step-offs or holes, and of swirls and eddies; that at said time said Horan had on his clothes and boots or shoes; that while so engaged in throwing, dragging or hauling said seine in said river, he suddenly came to one of these step-offs, or holes, and to a swirl or eddy, and stepping into said hole, swirl or eddy, where the water

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was very deep, and being unable to swim or keep his head above the water, was drowned.

The appellant's demurrer to each of these affirmative paragraphs of answer was overruled, and the appellant was ruled to reply. Afterward the appellee withdrew its answer of general denial. The appellant refused to plead further, the cause was submitted to the court for finding and judgment upon the pleadings, and the court found for the appellee and rendered judgment accordingly.

We are required to consider the action of the court in overruling the demurrer to the second and third paragraphs of answer.

These provisions printed upon the back of the policy were not conditions precedent. They were exceptions to the contracted insurance. They provided that the particular cases of injury or death specified should not be covered by the insurance contracted for on the face of the policy.

The existence of facts bringing the death of the insured within such an exception would constitute matter of defense, and the burden of pleading and proving such facts was upon the insurer.

It was proper to set forth in each of the answers the particular provision of the contract upon which the pleader intended to base the defense, and it was not improper to make an averment in the language of the contract, bringing the death within the exception so pleaded; but in the second paragraph it was necessary to show an unlawful act by the averment of facts constituting a violation of law or a vicious act; and this general averment, in the language of the exception pleaded, was controlled by the particular facts which were alleged to show the death to have been within such exception.

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By the averments of facts in the second paragraph the appellee sought to show that the insured at the time of his death was violating a particular criminal statute; but there was a manifest failure to show a violation of the statute. It was not alleged that the water in which he was seining was above tidewater. This was an omission of an essential element of the offense defined by the statute. The words "above tide-water," in the statute constituted a part of the description of the offense. This defect in the pleading was not, as suggested by counsel, one which was waived by failure to move to make the pleading more specific, but was one which rendered the pleading insufficient on demurrer. The act of the insured, described, was not vicious in its nature, and it was not unlawful, unless shown to be a violation of a statute. It was not shown that it was not a lawful act.

It may be said further concerning such a defense as that which it was thus unsuccessfully attempted to plead in the second paragraph, that if the facts pleaded show the death of the insured while engaged in an unlawful or vicious act, it must also appear that the act was one which increased the risk, and one between which and the death there was a causative connection.

In *Bloom v. Franklin, etc., Ins. Co.*, 97 Ind. 478, where the provision of the policy under consideration was, if the assured should die "in the known violation of the laws of the State or of the United States," it was said: "A known violation of a positive law, whether the law is a civil or a criminal one, avoids the policy, if the natural and reasonable consequences of the violation are to increase the risk; a violation of law, whether the law is a civil or criminal one, does not avoid the policy, if the natural and reasonable consequences of the act do not increase the risk. Whether

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the violation of law was the proximate cause of death, and whether it was an act increasing the risk, must in general be determined from the facts of the particular case. There must in all cases, whether the law violated be a criminal or a civil one, be some causative connection between the act which constituted the violation of law and the death of the assured." See, also, *National Benefit Assn. v. Bowman*, 110 Ind. 355; *Insurance Co. v. Bennett*, 90 Tenn. 256, 16 S.W. 723; *Bradley v. Mutual Benefit etc., Ins. Co.*, 45 N. Y. 422; *Jones v. U. S. Mutual Acc. Assn.*, 92 Ia. 652, 61 N.W. 485.

Such exceptions are prepared and inserted in the contract by the insurer for the purpose of narrowing the obligations under the policy, and they are to be construed most strongly against the insurer and in favor of the insured. *Milwaukee, etc., Ins. Co. v. Niewedde*, 12 Ind. App. 145.

It cannot be supposed that the insured in accepting the policy containing this exception contemplated, as embraced therein, injury or death while he should be engaged in an act which would not increase the risk, and between which and the injury or death there would be no causative connection; but it must be presumed that he contemplated only acts by which the risk would be increased and to the doing of which the injury or death could be attributed as a reasonable consequence. Many deaths from accidental causes of insured persons while engaged in unlawful acts may be supposed, where there would be no reasonable ground for concluding that the insured, in accepting a policy containing such an exception, contemplated the loss of the indemnity contracted for, if his death should be so caused. If such an insured person should be killed by a tile blown from a house top while he was unlawfully traveling on Sunday, or if he should

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be accidentally shot while violating a law against profanity, or while unlawfully engaged in seining, it could not be claimed reasonably that such a death was within the exception. *Bloom v. Franklin, etc., Ins. Co., supra.*

But the parties make their contract, and such an exception should not be refined away by the court to the extent of making a different contract for the parties. A reasonable conclusion as to the intention of the parties should be sought. *Continental Ins. Co. v. Vanlue*, 126 Ind. 410.

To relieve the insurer from liability it is not necessary that it be shown that the insured expected death in the manner in which it occurred, or that he knew of the particular danger which was the cause of his death.

In *Bloom v. Franklin, etc., Ins. Co., supra*, it is said: "While the unlawful act of the assured must tend in the natural line of causation to his death, in order to work a forfeiture, it is not necessary that the act should be the direct cause, nor that the precise consequences which actually followed could have been foreseen. It is enough if the act is unlawful in itself, and the consequences flowing from it are such as might have been reasonably expected to happen, for, in such a case the ultimate result is traced back to the original proximate cause."

In the second paragraph of answer under consideration, if it had been alleged that the drowning was at a place above tidewater, and it had thus been shown that the insured was engaged in an unlawful act, it would not have been necessary to show also that the insured knew of the particular peril which caused his death. Drowning while being engaged in seining in water in which such an act can be performed seems to be, *prima facie*, a result which would not have hap-

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pened but for being so engaged, and to be an incident of the act in which he was engaged and a consequence thereof without reference to the question whether the seining was or was not an unlawful act.

We should seek by the same rule of construction to ascertain the intention of the parties in the exception upon which the third paragraph of answer is based. We must resolve any doubt against the insurer.

Do the facts stated in that paragraph show the death of the insured "resulting from or attributable partially or wholly, directly or indirectly, by or in consequence of voluntary exposure to unnecessary danger or perilous venture?"

Giving the words definitions, and the language a meaning most unfavorable to the insurer and most favorable to the insured, the exception may be construed as contemplating knowledge on the part of the insured of the existence of the danger or peril and an encountering of it by him willingly.

We think that the facts alleged do not show that the death of the insured was within the exception. They indicate an accidental death from a suddenly encountered danger. It is not shown that the insured consciously and intentionally exposed himself to danger, or that he presumed or dared to run a risk of peril. It does not follow because an act was voluntary that the exposure was voluntary.

If the pleading shows negligence on the part of the insured, it will hardly be contended that it was the purpose to except injury or death through an inadvertent act or omission of the insured. See *Schneider v. Provident, etc., Ins. Co.*, 24 Wis. 28; *Manufacturers' Acc. Indemnity Co. v. Dorgan*, 58 Fed. 945; *Burkhard v. Travelers' Ins. Co.*, 102 Pa. St. 262; *Providence, etc., Co. v. Martin*, 32 Md. 310; *DeLoy v. Trav-*

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elers' Ins. Co., 171 Pa. St. 1, 32 Atl. 1108; *Miller v. Insurance Co.*, 92 Tenn: 167, 21 S. W. 39; *Collins v. Bankers' Acc. Ins. Co.* (Ia. Sup.), 64 N.W. 778; *Jones v. U. S. Mutual Acc. Assn.*, *supra*.

We are of the opinion that both of the affirmative answers were insufficient on demurrer.

The judgment is reversed, and the cause is remanded with instructions to sustain the demurrer to the second and third paragraphs of answer.

 WESTERN UNION TELEGRAPH COMPANY v. BRYANT.

[No. 1,998. Filed February 17, 1897.]

TELEGRAPH COMPANIES.—*When Damages May be Recovered for Negligence, Causing Mental Anguish Alone.*—A telegraph company may be held liable for special damages for failing to deliver a message, although the damages consist of mental anguish alone, where the language of the message gives direct notice to the company that the message concerns such event or events as that negligence on the part of the company is likely to be followed by mental distress. *p. 74.*

SAME.—*Form of Telegram.—Mental Anguish.*—The language of the telegram: "Can not come to-day. Will come to-morrow," did not advise the company that a failure to deliver it would be likely to cause mental distress. *p. 74.*

SAME.—*Failure to Deliver Telegram.—When Damages too Remote to Permit a Recovery.*—The physical discomforts of a woman occasioned by her walking and carrying heavy parcels a distance of four blocks as a result of the failure of a telegraph company to deliver the message: "Cannot come to-day. Will come to-morrow," are damages too remote to permit of a recovery. *p. 74.*

SAME.—*Action for Failure to Deliver Message.—Complaint.—Nominal Damages.*—A complaint alleging a failure of a telegraph company to deliver a message, for which pay was received in advance, to a person to whom it was addressed, is sufficient to withstand a demurrer, as it shows a right to nominal damages. *p. 76.*

From the Monroe Circuit Court. *Reversed.*

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W. M. Loudon and T. J. Loudon, for appellant.

John R. East, Robt. G. Miller and James E. Steele, for appellee.

COMSTOCK, C. J.—The appellee sought to recover damages against the appellant for failure to transmit and deliver a telegraph message to her husband. Trial by jury, and judgment for \$105.00. The complaint was in two paragraphs. The first was for the statutory penalty. The second for special damages arising from the failure of the defendant to transmit and deliver the message. The appellant has assigned four errors, viz.: 1. Error of the court in overruling the demurrer to each paragraph of complaint; 2. Error in overruling appellant's motion for a new trial; 3. Error in overruling appellant's motion for judgment in its favor on the special verdict; 4. Error in sustaining motion of appellee for judgment on the special verdict.

The jury were instructed that under the first paragraph of the complaint they could not allow the plaintiff more than \$100.00. As the verdict returned is for \$105.00, it is evident that their finding was upon the second paragraph. We do not, therefore, deem it necessary to say more in reference to the first paragraph than that, so far as any defects are pointed out, it is sufficient. The third and fourth errors assigned are not discussed by appellant's counsel and are, therefore, under the rule, considered as waived.

The substance of the second paragraph is as follows: "That on the 4th of December, 1894, plaintiff placed in hands of defendant's agents at Indianapolis, Indiana, the following message: Indianapolis, Indiana, December 4, 1894. To John Bryant, Bloomington, Indiana. Cannot come to-day. Will come to-morrow. Nancy Bryant." That she paid the usual

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charge for transmitting like messages; the defendant agreed to transmit the message promptly, but carelessly neglected, and willfully failed to deliver the same to John Bryant, who is her husband; that he lived within four blocks, and less than a mile of the defendant's office at said Bloomington, Indiana; that on the 4th of December she was visiting friends at Indianapolis, and had previously informed her husband that she would arrive home in the city of Bloomington on the 3:41 p. m. train, December 4, 1894, and her husband was to meet her; that it was impossible for her to return on said train; that she did return next day, December 5, as stated in the telegram; that on arriving at Bloomington her husband was not at the depot; that his failure to be there was caused by the nontransmission and nondelivery of the telegram by the defendant; that she was greatly annoyed and distressed in body and mind, and greatly embarrassed, that there was no one to meet her or to assist her to her home several blocks away; that she was obliged to carry a heavy valise and several bundles without assistance; that she endured great humiliation, physical exhaustion, and mental suffering, and vexation by reason of the bad faith and negligence of defendant; that she made a written demand on defendant for \$100.00, etc.

Direct and proximate damages resulting from the negligence of telegraph companies may be recovered in any event. Indirect, collateral, or consequent damages, resulting from such negligence may also, under some circumstances, be recovered. The expression that the sender of a telegram is entitled to such damages as are the natural and proximate consequence of the company's negligence is frequently found in judicial opinions. "The cardinal rule," said Earl, C. J. (in a statement of the rule, which Thompson, in

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quoting in his work on the law of electricity, section 312, says has never been surpassed), “undoubtedly is that the one party shall recover all the damages which have been occasioned by the breach of contract by the other party. But this rule is modified in its application by two others. The damages must flow directly and naturally from the breach of the contract, and they must be certain, both in their nature and in respect to the cause from which they proceed. Under this latter rule, speculative, contingent and remote damages, which cannot be directly traced to the breach complained of, are excluded, * * * But the damages must be such as the parties may *fairly be supposed* to have contemplated when they made the contract.” *Leonard v. New York, etc., Telegraph Co.*, 41 N. Y. 544.

In *Baldwin v. U. S. Telegraph Co.*, 45 N. Y. 744, speaking for the court, Allen, J., says: “Whenever special or extraordinary damages, such as would not naturally or ordinarily follow a breach, have been awarded for nonperformance of contracts, whether for the sale or carriage of goods, or for the delivery of messages by telegraph, it has been for the reason that the contracts have been made with reference to peculiar circumstances known to both, and the particular loss has been in the contemplation of both, at the time of making the contract, as a contingency that might follow the nonperformance. * * * When a special purpose is intended by one party, but is not known to the other, such special purpose will not be taken into account in the assessment of damages for the breach.”

Thompson, *Electricity*, section 313, says: “A negative brief statement of this rule is, that there can be no recovery for a loss arising from special circumstances not communicated to the company at the time when the despatch is delivered to it for transmission,

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or before it has assumed the undertaking, or before the time has elapsed within which it has become impossible for it to perform it so as to avoid loss."

There is a conflict in the decisions of the courts of the different states as to whether damages may be recovered for mental distress alone, when not connected with physical injury or pecuniary loss. It is the law in this State, however, that damages may be recovered for negligence causing mental distress alone. *Reese v. West. U. Tel. Co.* 123 Ind. 294, 7 L. R. A. 583; *West. U. Tel. Co. v. Stratemeier*, 6 Ind. App. 125; *West. U. Tel. Co. v. Newhouse*, 6 Ind. App. 422.

The courts which hold that damages for mental suffering alone may be recovered, base the recovery upon the fact that the language of the message gives direct notice to the telegraph company that the message concerns such event or events as that negligence on the part of the company is likely to be followed by mental distress. The telegraph company then has the measure of responsibility, and is held liable for special damages for negligence. *Croswell, Electricity*, section 649.

The language of the message of appellee, "Cannot come to-day, will come to-morrow," did not advise the company that a failure to deliver it would be likely to cause mental distress. It does not even request any one to meet her at the station. It does not suggest that humiliation or mental distress would reasonably result from the failure of the person to whom it was addressed to be present upon her arrival at the place of destination. The physical discomforts of which plaintiff complains, occasioned by her walking and carrying heavy parcels from the railroad station to her home, a distance of four blocks, are damages too remote to permit a recovery. Upon this branch of the case we cite *Stafford v. W. U. Tel. Co.*, 73 Fed. 273;

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McAllen v. West. U. Tel. Co., 70 Tex. 243, 7 S.W. 715; *West. U. Tel. Co. v. Smith*, 76 Tex. 253, 13 S.W. 169.

In *Stafford v. W. U. Tel. Co.*, *supra*, plaintiff, who was traveling with her sick mother, gave to a telegraph company at a station on her route, a message addressed to her brother as follows: "Mother sick. Meet us this evening at D." The company failed to deliver the message. The court held that damages caused to the sender by being compelled to search at night in a strange place for her brother's residence, with exposure producing illness, or caused either to the sender or addressee by the death of their mother in consequence of such exposure or danger, were not the proximate results of the failure of the telegraph company to deliver the message, and could not be recovered.

McAllen v. W. U. Tel. Co., *supra*, was an action against the telegraph company for failure to transmit a message. It appeared that the plaintiff was informed by defendant's agent that there was a telegraph office at the station to which he wished to send a message, and that the agent became aware that such office had been closed for some time soon after he sent the message, but concealed this knowledge from plaintiff. Plaintiff did not make known to the agent that the message, which in form was an ordinary telegram, was of great importance to him. The court held that plaintiff's mental sufferings and apprehension upon not being met at the station by the family carriage, which he had ordered by telegraph upon hearing of his father's illness, could not enter as an element of damages in an action against the telegraph company for failure to transmit the message. Damages for bruises alleged to have been received in consequence of plaintiff's being obliged to take a rough

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vehicle instead of the family carriage to a certain point, are too remote to base a claim against a telegraph company for failure to transmit a message ordering the family carriage to meet him at the station.

In *Telegraph Co. v. Smith, supra*, plaintiff sued for failure to deliver a telegraphic message as follows: "R [addressed]. Meet me in C, Saturday night. [Signed]," alleging that by its negligence he was put to expense in hiring a conveyance to go from C to R's home and back again; that by loss of time he failed to meet important engagements, and that by reason of exposure his health was greatly impaired, to his damage in the sum named. The court held that the petition was bad on demurrer, the damage being too remote, conjectural, and not in contemplation of the parties in case of a breach of the contract.

Giving these authorities due weight, still, the second paragraph of the complaint alleges a valid contract between the plaintiff and defendant, and its breach by the latter; and these allegations, if proven, would entitle the plaintiff to nominal damages, the amount paid for transmission of the message. The demurrer was, therefore, properly overruled.

In appellant's motion for a new trial, the eighth reason is, that the amount of damages assessed is too large. The ninth reason is, that the damages assessed are excessive. As the plaintiff is, in the view the court takes of the law, entitled to only nominal damages, the case must be reversed.

Other alleged errors are discussed, but as they may not occur upon another trial we do not deem it necessary to pass upon them.

Reversed, with instructions to the court below to sustain appellant's motion for a new trial.

Ross v. Stockwell.

ROSS v. STOCKWELL.

[No. 2,028. Filed February 17, 1897.]

APPEAL.—*Lost Pleading, How Brought into Record.—Certiorari.*—A lost pleading must, by order or leave of court under the proper proceeding therefor, be first substituted in the lower court before the Appellate Court can by writ of *certiorari* bring such pleading into the record.

From the Monroe Circuit Court. *Certiorari denied.*

H. C. Duncan, I. C. Batman and W. H. East, for appellant.

John R. East and Robt. G. Miller, for appellee.

HENLEY, J.—Appellee in this cause files an application for a writ of *certiorari*, supported by affidavit. It appears, from the application and from the several affidavits filed in its support, and also from the affidavits filed by the appellant, who resists the granting of such writ, that the pleading, or that part of it which the appellee seeks to bring into the record by *certiorari*, is lost and is not now upon the files in the clerk's office of Monroe county, Indiana.

We do not think appellee has proceeded properly in the matter. A lost pleading must, by order or leave of court under the proper proceeding therefor, be first substituted in the lower court before this court can by writ of *certiorari* bring such pleading into the record. *Burkam v. McElfresh*, 88 Ind. 223.

Elliott, in his work on Appellate Procedure, section 596, says: "If pleadings are lost they must be substituted below, and to accomplish that office the proper proceedings must be there prosecuted. After substitution, pursuant to the order of the trial court,

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they may be brought into the record on appeal by *certiorari*."

It follows, from what we have said, that this application must be denied.

Application denied.

BEESON ET AL., BY NEXT FRIEND *v.* TICE.

[No. 2,081. Filed Dec. 1, 1896. Rehearing denied Feb. 18, 1897.]

ANIMALS.—Running at Large.—Public Highway is Not a Public Common.—Statute Construed.—Cattle pasturing on the public highway cannot be impounded under section 2833, Burns' R. S. 1894, which provides that "Whenever any animal shall be found running at large or pasturing upon any of the unenclosed lands or public commons of any township in any county in this State, etc., any person being a resident of said township shall be authorized to take up and impound said animal in a private or public pound within said township," as it cannot be held that a public highway is a common or an unenclosed piece of land. *pp. 80, 81.*

SAME.—When Running at Large.—Statute Construed.—Section 2838, Burns' R. S. 1894, making it the duty of all road supervisors "upon view or information, to cause all horses, mules, cattle, etc., running at large upon the roads, commons or unenclosed lands within their respective districts which are not authorized to run at large by order of the board of commissioners, as by law provided, to be impounded," etc., does not authorize the impounding of cattle pasturing on the public highway in charge of attendants, as such animals are not running at large when so attended. *pp. 81-83.*

SAME.—Running at Large.—Statutes In Pari Materia Construed.—Construing sections 2833 and 2838, Burns' R. S. 1894, together they would not prevent the pasturing of stock on the public highway if the stock at the time is in the care of some one and is not running at large, as the former section applies to commons or unenclosed lands and the latter section applies only to stock running at large. *p. 84.*

From the Hamilton Circuit Court. *Reversed.*

John F. Neal and S. D. Stuart, for appellants.

Thomas J. Kane and Ralph K. Kane, for appellee.

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REINHARD, J.—On the 3d day of June, 1895, the appellants, Carl Beeson and Willis Beeson, both minors, were in charge of eleven milch cows, owned by different persons, who had intrusted the animals to their care under a contract made with them by which they were to herd the cows at a certain price per week for each head. The appellants, on the day named, and on other days prior thereto, were grazing the animals along the public highway leading out of the city of Noblesville, and on this occasion had proceeded but a short distance from said city, on their way, as appellants claim, to White river, for the purpose of watering said cows, when they were overtaken by the appellee, who was at the time the supervisor of roads of district No. 5, in which the animals were then found, and who took said animals away from the appellants and into his custody, claiming to do so in pursuance of his duty as such officer. The appellee thereupon impounded the animals and posted a notice that he had, as such officer, on the 3d day of June, 1895, “taken up the following described animals [being the cows mentioned], found running at large and pasturing upon the unenclosed lands and public commons of Noblesville township, Hamilton county, Indiana.” On the 4th day of June, 1895, the appellants, by their next friend, instituted this action in replevin against the appellee, for the recovery of the possession of the cows.

The cause was tried by the court, without a jury, and there was a finding and judgment in favor of the appellee and against appellants for costs. The overruling of the appellants’ motion for a new trial is the only error assigned.

There is no substantial conflict in the evidence. The facts heretofore set out are practically agreed upon, and the principal question made upon them is as to

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their sufficiency to entitle the appellee to the judgment from which this appeal is taken.

There was at the time no order of the county board permitting cattle or other animals to run at large. It would seem from the reading of the notice given by the appellee that the animals were taken up by the appellee by virtue of section 2833, Burns' R. S. 1894 (2639, Horner's R. S. 1896), which provides that "Whenever any animal shall be found running at large or pasturing upon any of the unenclosed lands or public commons of any township in any county in this state which shall not be specified in the order of the board of commissioners of said county, as in the preceding sections provided, to have the right to so run at large or pasture thereon, any person being a resident of said township shall be authorized to take up and impound said animal in any private or public pound within said township."

It will be observed that this section does not authorize the road supervisor, as such, to take up the animals, but it authorizes any resident of the township to do so. Perhaps the fact that the appellee in this case was the road supervisor is sufficient evidence to prove that he is also a resident of the township in which the animals were taken up. The difficulty, however, of bringing the present case within the purview of the section of the statute above quoted lies in the fact that here the animals were not pasturing upon the public commons or upon any unenclosed lands, for it cannot be held that a public highway is a common or an unenclosed piece of land. The International Dictionary defines a common to be "an enclosed or unenclosed tract of ground, for pasturage, for pleasure, etc., the use of which belongs to the public or to a number of persons."

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Anderson's Law Dictionary gives it the definition: "The common field; ground set apart for public uses."

We must take judicial cognizance of the fact that a public road or highway is not a common. It is used by the public under the right of eminent domain, and outside of this the owner of the fee has the absolute dominion over the soil. He doubtless has the right of pasturage and other products growing in the soil of the untraveled portion of the road adjoining his lands, and may have a remedy against all persons trespassing upon these rights. But it is only by statutory enactments that a supervisor of highways or other person is authorized to take up stock pasturing in the highway, and it is to the statutes alone that the courts must look when called upon to declare such authority in favor of any person.

Indeed, it is not contended by the learned counsel for the appellee that the animals in charge of the appellants in this highway, were taken up by the appellee under and by virtue of the provisions of the section of the statute above set forth. What counsel do insist upon is, that section 2838, Burns' R. S. 1894 (2643a, Horner's R. S. 1896), renders it the duty of all road supervisors, "upon view or information, to cause all horses, mules, cattle," etc., "running at large upon the roads, commons or unenclosed lands, within their respective districts, which are not authorized to run at large by order of the board of commissioners, as by law provided, to be impounded," etc., and provides for a penalty for failure to comply with the act.

The section giving any resident of the township the authority to impound does not use the terms "roads, commons, or unenclosed lands," as does the section which makes it the duty of supervisors to take up such stock. There is, therefore, no provision in the law

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which in express terms authorizes the impounding of animals found pasturing in the public highways. It follows, we think, that unless the cows were "running at large," within the meaning of the section which requires the road supervisor to impound such animals, they could not be lawfully taken up by the appellee.

We have not been able to find any construction of the term "running at large" by the courts of our own State, and counsel have not called our attention to any such.

In Anderson's Law Dictionary the term "running at large" is defined as follows: "To stroll without restraint or confinement; as for an animal to run at large." Under the head of "at large" he defines the latter words to mean: "Unconfined, unrestrained, in the free exercise of natural freedom or propensities, as an animal suffered to run at large."

Under a simliar statute the Supreme Court of Michigan has decided that a herd of cattle in a highway in charge of a boy thirteen years old, which had been there every day for a week or more, were not at large within the meaning of the statute. The court said: "When cattle are in the public highway, in charge of a person directing or controlling their movements, they are not running at large within the meaning of the statute. The language applies to animals in the highway without being in the custody or under the control of any person; consequently, the defendant had no right to impound the cattle in this case, as the record shows that they were being tended by the plaintiff's servant, and were in his custody." *Bert-whistle v. Goodrich*, 53 Mich. 457, 19 N. W. 143.

In a case of trespass for shooting a dog, it was claimed that the defendant had a right to shoot the dog by virtue of a statute of Vermont, which permitted such shooting of dogs running at large. It was

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shown that the dog was in charge of his master, and was pursuing a fox when shot by the defendant. It was held that the dog was not running at large within the meaning of the statute. *Wright v. Clark*, 50 Vt. 130, 28 Am. Rep. 496.

In a California case it was held that cattle driven along a road in charge of a herder, and which in passing casually eat of the grass growing on the road side, are not "astray" or "running at large," within the meaning of a statute forbidding cattle or stock to run at large upon any public highway. *Thompson v. Corpstein*, 52 Cal. 653. See, also, *Russell v. Cone*, 46 Vt. 600.

The California statute also forbids the pasturing of cattle in the highways. The case above cited declares that driving stock along the road and permitting them casually to eat some of the grass growing therein is not such pasturing as the statute contemplates. Doubtless, if our statute made such pasturing unlawful and a cause for taking them up by the supervisor, the appellee would have been justified in his act of impounding them, but as we have seen the statute makes no such provision. Here the cows were actually pasturing in the road, as we must assume, and if this were a cause for taking them up, the case would be made out. But the statute under which the animals were taken into custody by the appellee, applies only to animals running at large. Under the authorities cited they cannot be said to be running at large when in charge of one or more attendants, as the animals were in the case before us.

It may seem difficult to understand why the supervisor should not have as much authority for impounding stock which is being pastured in the public highways, as a private citizen has to take up animals found pasturing upon the public commons. But it does not appear that the legislature has conferred

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such power upon a road supervisor, or other person, and it is not our province to read such authority into the statute. The remedy must be sought in appropriate legislation. The evidence is insufficient to support the finding and the motion for a new trial should have been sustained.

Judgment reversed.

ON PETITION FOR REHEARING.

ROBINSON, J.—It is urged by appellee's counsel that the court erred in its opinion in this cause in not construing sections 2833 and 2838, Burns' R. S. 1894, together as in *pari materia*. Section 2838, *supra*, does not provide for taking up animals found pasturing on the roads, commons, etc., but only for taking up animals found running at large upon such roads or commons. The opinion very clearly states what the words "running at large" mean in these statutes. Neither of the above statutes prohibits the pasturing of stock upon a road or public highway if the stock at the time is in the care of some one and is not running at large. In this case the stock was not running at large upon a highway, but was pasturing upon a highway while in care of the owner, so that it could not be taken up either under section 2833, or 2838, *supra*.

The petition for a rehearing is overruled.

POND v. SIMONS.

[No. 1,979. Filed October 23, 1896. Rehearing denied Feb. 19, 1897.]

JUDGMENTS.—*By Confession.*—*Judgment Note.*—*When Doctrine of Presumption of Regularity Does Not Apply.*—The doctrine that judgments by confession are sustained by the presumption that they are regular, unless the contrary appears upon the record, is not applicable to a judgment which is not rendered by a judicial officer nor by a court, but merely entered by a ministerial officer without the intervention of any judicial tribunal, on a note containing a

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provision authorizing any attorney of any court of record to appear and confess judgment for the amount of the note.

SAME.—*Foreign Judgment.—Collateral Attack.—Jurisdiction.*—In a suit on a domestic judgment the record as to jurisdictional facts cannot be disputed; but in suit on a foreign judgment the finding of jurisdictional facts may be collaterally questioned.

From the Cass Circuit Court. *Affirmed.*

M. Winfield, C. E. Taber and G. C. Taber, for appellant.

Frank Swigart and John B. Smith, for appellee.

GAVIN, J.—Appellant sued appellee upon a judgment rendered against him, by confession, in an Illinois city court.

That judgment was based upon what is known as a “judgment note” containing this provision: “And I do hereby authorize any attorney, of any court of record, to appear for me in any such court of record and confess a judgment for the amount due hereon, together with all costs and fifteen dollars attorney’s fees at any time after maturity, either in term or vacation, and to agree that no writ of error or appeal shall be prosecuted on such judgment, nor any bill in equity filed to interfere therewith, and to release all errors and to consent to immediate execution thereon.”

The record set forth in the complaint discloses that a complaint on this note was duly filed; that Alschuler & Murphy, as attorneys for appellee, appeared and filed an answer, confessing the complaint, whereupon judgment was rendered and entered.

The appellee filed various answers, setting up that he had always been a resident of the State of Indiana; that he was not served with any process, and had no knowledge of such proceedings and did not appear thereto, nor authorize any one to appear for him; and that the instrument sued upon was executed with-

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out any consideration, under duress, etc. The court held the answers good.

Appellant insists that the record shows a judgment regularly and duly rendered, and that appellee may not contradict the record, nor defeat the judgment by the assertion of any matter which would have been properly pleaded as defense in that action.

It is contended, upon the authority of *Westcott v. Brown*, 13 Ind. 83; *Kingman v. Paulson*, 126 Ind. 507, and *Zapp v. Hager*, 70 Ill. 223, that the recitals of the record as to jurisdictional facts cannot be disputed.

This is doubtless the correct rule where a domestic judgment is involved, as in *First Nat. Bank v. Hanna*, 12 Ind. App. 240, but the Supreme Court of the United States, to which we must look as the highest arbiter upon questions like this involving the construction of the provisions of the United States Constitution and statutes, has overthrown this earlier doctrine of our own and other states as applied to judgments rendered in other states. It declares that, "notwithstanding the averments in the record of the judgment itself, the jurisdiction of the court by which a judgment is rendered in any State may be questioned in a collateral proceeding; that the jurisdiction of a foreign court over the person or the subject matter is always open to inquiry; that, in this respect, a court of another State is to be regarded as a foreign court." *Grover, etc., Co. v. Radcliffe*, 137 U. S. 287; *Brown on Jurisdiction*, section 26.

It is claimed by counsel that judgments by confession are sustained by the presumption that they are regular unless the contrary appears upon the record. It is true that it is said in *Caley v. Morgan*, 114 Ind. 350, that "judgments by confession are supported by the same presumptions which sustain other judgments when collaterally called in question." This was said,

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however, when considering a domestic judgment, rendered in open court. The doctrine ought not to be and is not applicable when considering a judgment such as this is claimed to be, not rendered by a judicial officer, nor by a court, but merely entered by a ministerial officer without the intervention of any judicial tribunal. If we were to give to the judgment, as claimed by appellant, the same force and effect which it would possess in Illinois, still no presumption would come to its relief. In *Matzenbaugh v. Doyle*, 156 Ill. 331, 40 N. E. 935, it is said by the Supreme Court of that state, concerning such a judgment: "The entry of judgment having been made in vacation, before the clerk,—a mere ministerial officer,—it will be aided by none of those presumptions which prevail where judgments are entered in open court." That there was a clear distinction between such judgments entered in term time and those entered in vacation was early recognized in Illinois. "But a judgment confessed in vacation creates no such presumption, as the same indentments are not indulged in to sustain ministerial, as are in favor of judicial acts." *Roundy v. Hunt*, 24 Ill. 598.

The statutes of Illinois do authorize judgments to be confessed by defendants in person or by attorney, either in term time or in vacation, and judgments entered in vacation shall have like force and effect and from the date thereof become liens, in like manner and extent as judgments entered in term. Laws 1857, p. 29, section 2.

The courts of Illinois sustain and give effect to such judgments, although in this State they cannot be entered except when rendered in open court. It is, however, held in Illinois that "the confession of judgment in vacation is a statutory proceeding in derogation of the common law." *Gardner v. Bunn*, 132 Ill. 403, 23 N. E. 1073, 7 L. R. A. 729.

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It is asserted by appellee that the judgment sued on is void because it appears upon its face to have been rendered by the court or judge in vacation; while appellant urges that it does not affirmatively appear that the judge rendered the judgment and "that in the absence of the contrary appearing on the face of the judgment, the presumption would be that it was entered according to law by the proper officers charged with the duty."

That this presumption cannot be invoked according to the decisions of Illinois, we have already seen.

In *Louisville, etc., R. W. Co. v. Parish*, 6 Ind. App. 89, this court said: "If the exercise is one of special statutory powers, the record must show that the statutes have been complied with."

The record of the proceedings in Illinois opens as follows: "Pleas before the Hon. Russell P. Goodwin, judge of the city court of Aurora, *in vacation*, after the regular term of said court, begun and held at the court room in the city of Aurora in said county on the third Monday, the 18th day of September, 1893, to-wit, on the 4th day of November, 1893. Present: Hon. Russell P. Goodwin, judge of said court, Frank Joslyn, State's attorney for Kane county. Attest, James Shaw, clerk: Be it remembered that on said 4th day of November, 1893, there was filed in said court a certain *narr.* and *cognovit* which read as follows:" Here are set out, a regular complaint, the note and affidavit and confession by Alschuler & Murphy as attorneys for the defendant. Following these is the further entry: "Be it further remembered that thereupon on the said 4th day of November, 1893, the said day being in vacation after the regular term of said city court of Aurora, begun and held at the court room in said county the following proceedings were had and entered of record in said court to-wit: *Frederic L. Pond*

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v. *Noah Simons*. Confession. This day comes the plaintiff herein by Bacon & Cassen, his attorneys, and files herein a plea of trespass on the case on promises; and thereupon comes the defendant herein by Alschuler & Murphy, his attorneys in fact, who file herein his warrant of attorney duly executed and proven and also his *cognovit* confessing the action aforesaid of the plaintiff against the said defendant and that the said plaintiff has sustained damages by occasion of the premises to the sum of \$271.26 which includes \$15.00 attorney's fees.

"It is therefore considered by the court that the plaintiff do have and recover," etc.

As we construe this record, it clearly shows a judgment rendered by the court through its judge and not one merely entered up by the clerk upon the papers filed. The statements are, that the proceedings were before the Hon. Russell P. Goodwin, Judge, and that he was present with all his officers necessary to constitute a court, and that "it is therefore considered by the court," etc. All these statements must be disregarded and counted as meaningless unless we construe this record to show that this judgment was one rendered by the judge of the court.

Were such a record of a judgment of this State presented to us without the words "vacation" and "after the regular term" we do not believe that anyone would pretend to argue that the judgment should be held void because it appeared upon its face to be a proceeding before the clerk merely, and was simply his act and not the judgment of the court through the judge.

Since, then, it purports to be the judgment rendered by the judge in vacation we must hold it void because the judge in vacation has no power to render the judgment. Such are the express adjudications of the

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Supreme Court of Illinois. "With us the judge has no power to make orders in vacation, unless it be conferred by statute. * * * The statutes giving powers to the judges in vacation do not include the power to order the entry of judgment by confession." *Conkling v. Ridgely*, 112 Ill. 36, 44.

This is in harmony with the law as declared in our own State.

Pressley v. Harrison, 102 Ind. 14, decides that "a judge in vacation exercises only limited statutory power, and in such cases it must affirmatively appear that such a state of facts existed as warranted the exercise of jurisdiction," and that "the power which a judge may exercise in vacation is such special statutory power as is prescribed. Whatever it is asserted may be done by him, except in term, authority therefor must be found in the statute."

It being our conclusion that the judgment is void for want of jurisdiction of the judge over the subject-matter of the action, we need not take up other questions argued.

Judgment affirmed.

ON PETITION FOR REHEARING.

HENLEY, J.—This court has again carefully considered the points raised by the argument of counsel for appellant in this cause upon his petition for a rehearing.

This court held in its original opinion herein that the judgment upon which appellant brought this action in the lower court was void for want of jurisdiction of the judge over the subject-matter of the action. It follows that appellant had no right of action against appellee. It has been repeatedly held by the Supreme Court of this State and by this Court, that

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“where the plaintiff appeals, as in this case, and the record shows he has no cause of action against the defendant, intervening errors, if any, must be regarded as harmless and the judgment must be affirmed.” *Clawson, Tr., v. Chicago, etc., R. W. Co.*, 95 Ind. 152, and cases there cited.

The petition for a rehearing is overruled.

WILEY, J., took no part.

HAY ET AL. v. LANDIS.

[No. 2,042. Filed Oct. 21, 1896. Rehearing denied Feb. 19, 1897.]

COMPLAINT.—*Sufficiency of in an Action to Set Aside Sale of Letters Patent on the Ground of Fraud.*—A complaint in an action to set aside the sale of certain letters patent which alleges that defendants were the owners of such letters patent, that they conspired with a third party and thereby induced plaintiff to purchase and pay \$1,200.00 for the letters patent upon the representation that other parties, whom said third party pretended to represent, were ready and willing to take the same from him at an agreed price, should he procure the same, and which also alleged that plaintiff stated to defendants that the letters patent, if purchased, would be of no value to him and that defendants knew that plaintiff was purchasing same for the sole purpose of conveying same to the persons represented by said third party, contains facts sufficient to constitute a cause of action against defendants.

From the Miami Circuit Court. *Affirmed.*

B. F. Clemans, N. L. Agnew, D. E. Kelly and Nott N. Antrim, for appellants.

Thomas R. Marshall, William F. McNaghy and Philemon H. Clugston. for appellee.

LOTZ, J.—The appellee was the plaintiff, and the appellants the defendants in the court below. All the paragraphs of the complaint were withdrawn except

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the fourth and fifth. Demurrers were overruled to these and the appellants answered the general denial. The issues joined were tried by a jury and resulted in a verdict and judgment for the plaintiff. An assignment of error calls in question the sufficiency of each paragraph of the complaint. Each of these paragraphs, in substance, alleges that Hay and Grossnickle were the owners of certain letters patent, and that they conspired with Stockman to cheat and defraud the plaintiff out of the sum of \$1,200.00; that they induced the plaintiff to purchase and pay said sum for the letters patent upon the representation that other parties, whom Stockman pretended to represent, were ready and willing to take the same from him at an agreed price, should he procure the same.

There is an allegation that the plaintiff stated to Hay and Grossnickle that the letters patent, if purchased, would be of no value to him and that they knew that he was purchasing the same for the sole purpose of conveying the same to the persons represented by Stockman.

It is also averred that the letters patent were of no value, and there are many other averments of a technical character.

We are of the opinion that each paragraph is sufficient.

Another assignment of error is that the court erred in overruling appellants' motion for judgment on the pleadings. As the complaint was sufficient there was no error in this ruling.

The last assignment of error relates to the overruling of appellants' motion for a new trial.

It is insisted that the verdict is contrary to law and not supported by sufficient evidence.

An examination of the evidence shows that there was evidence supporting the verdict on all material

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points and convinces us that the judgment rendered is just.

Judgment affirmed.

ON PETITION FOR REHEARING.

COMSTOCK, C. J.—Appellants have filed a petition for rehearing in this case, in which they represent that the court in its decision rendered October 21, 1896, erred upon the following points:

1. In holding that the fourth and fifth paragraphs of the complaint contain facts sufficient to constitute a cause of action.

2. In holding that the verdict was sustained by sufficient evidence.

3. In holding that the verdict was supported by law.

In their original and very able brief, counsel for appellants fully discussed these points.

We have gone over the evidence and given these questions careful consideration and are of the opinion that the court, speaking by Judge Lotz, in the original opinion, reached a correct conclusion.

Petition overruled.

ALBANY FURNITURE COMPANY ET AL. v. MERCHANTS'
NATIONAL BANK OF MUNCIE.

[No. 1,967. Filed February 23, 1897.]

PLEADING.—*Action Based on Written Instrument.—Exhibit.*—When a written instrument which is the foundation of an action is filed as an exhibit with the pleading, as required by section 365, Burns' R. S. 1894, it becomes a part of the pleading, and will cure uncertainties therein. *p. 95.*

SAME.—*Appeal.*—*When a Defect in a Pleading May be Taken Advantage of After Judgment on Default.*—Where a defect in a pleading is

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such that it would have been available on demurrer before judgment, it may be taken advantage of on appeal after judgment rendered on default. *p. 96.*

SAME.—*Complaint.—Exhibit.*—An allegation in a complaint on a note which is made an exhibit and is signed by a company and two persons, that the latter two signed the note as “security” will be construed to mean that they signed as “surety.” *p. 96.*

From the Delaware Circuit Court. *Affirmed.*

J. W. Ryan and *W. A. Thompson*, for appellants.

J. F. Meredith and *E. E. Meredith*, for appellee.

ROBINSON, J.—In a suit by appellee against the appellants on a promissory note, judgment was rendered against appellants, Stafford and Zapf, upon a default and they question the sufficiency of the complaint by an assignment of error to this court.

The complaint, omitting the purely formal parts, is as follows: “The plaintiff complains of the defendants, and alleges that, on the 15th day of December, 1894, the defendant, the Albany Furniture Company, a corporation organized under the laws of the State of Indiana, and doing business at Albany, Delaware county, Indiana, by its promissory note, a copy of which is filed herewith, marked Exhibit ‘A,’ and made a part of this complaint, promised to pay the plaintiff or order, one hundred and fifty dollars, ninety days after date, together with 8 per cent. interest after maturity until paid, and attorney’s fees; payable at the Merchants’ National Bank of Muncie, Indiana. That the defendants, James E. Stafford and Jacob Zapf, signed said note as security; that said note is now past due, due the plaintiff and wholly unpaid. When plaintiff demands judgment for principal, interest, attorney’s fees, costs and all other proper relief in the sum of two hundred dollars.”

The note is as follows:

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“\$150.00. MUNCIE, IND., Dec. 15, 1894.

Ninety days after date I promise to pay to the order of the Merchants' National Bank of Muncie, one hundred and fifty dollars, with attorney's fees, value received, without any relief whatever from valuation or appraisement laws. The drawers and endorsers severally waive presentment for payment, protest and notice of protest, and nonpayment of this note, and all defenses on the ground of any extension of the time of its payment that may be given by the holder or holders to them or either of them. Negotiable and payable at the Merchants' National Bank of Muncie, with eight per cent. interest after maturity until paid.

ALBANY FURNITURE CO.
JAS. E. STAFFORD.
JACOB ZAPF, MANAGER.”

The only question discussed in appellants' brief is the sufficiency of the complaint.

When a written instrument which is the foundation of an action is filed with the pleading, as required by section 365, Burns' R. S. 1894 (362, R. S. 1881), it becomes a part of the pleading, just as much as if copied at length therein, and such an exhibit will cure uncertainties in the pleading. *Blount v. Rick*, 107 Ind. 238.

In the case of *Smith v. Cqrley*, 8 Ind. 451, there was a default upon a declaration which failed to allege the defendant to be the maker of the note and that the note was unpaid, and it was held that the declaration was insufficient.

In the case of *Old v. Mohler*, 122 Ind. 594, there was a default upon a complaint to recover damages for the breach of a covenant against encumbrances and neither a copy of the deed nor the original was exhibited with the complaint. The complaint was held bad in an attack for the first time on appeal.

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Each of the above cases is in conformity with the rule that if the defect in the pleading is such that it would have been available on demurrer before judgment, it may be taken advantage of on appeal after a judgment rendered on default.

It is insisted there is no averment in the complaint that the appellants, Stafford and Zapf, promised to pay anything, and that the word "security" used in the complaint cannot be construed to mean surety.

When the complaint and the exhibit are construed together, which must be done, it is clear that the use of the word "security" in the complaint was a clerical error and that the pleader intended to use the word surety. When the complaint alleges that the furniture company, by its promissory note promised to pay the appellee a named sum, and further alleges that appellants, Stafford and Zapf, signed that note as surety and their names do appear on the note, the law implies a promise on the part of Stafford and Zapf to pay the note in the event it is not paid by the principal.

While the pleading could not be commended as a model, yet, we think the complaint, construed with the exhibit, states a cause of action, and that a judgment on the complaint would be a bar to a suit against Stafford and Zaph on the same instrument.

Judgment affirmed.

FRY v. COLBORN.

[No. 2,035. Filed February 23, 1897.]

PLEADING.—Complaint.—Clerical Error.—A mere clerical error in the use of the word "plaintiff" where it is clear that the pleader intended to use the word "defendant" will not vitiate the pleading, but on appeal the pleading will be given the force which the proper word would have given it if the mistake had not been made. p. 98.

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SAME.—*Complaint on Account for Goods Sold to Defendant's Agent.*—
A complaint for goods sold and delivered to defendant's agent, is not sufficient on demurrer without an allegation that the goods were sold at the instance or request of the defendant, or upon his order, or that they were sold upon his credit. p. 99.

From the Floyd Circuit Court. *Reversed.*
M. Z. Stannard, for appellant.

C. P. and J. D. Ferguson, for appellee.

HENLEY, J.—The complaint filed in the lower court in this cause, upon which the judgment was rendered against appellant, omitting the caption, was as follows: "The plaintiff, Abram R. Colborn, transacting business as a lumber dealer under the name and style of A. R. Colborn & Co., complains of Jacob S. Fry, the defendant, and says, that the defendant is indebted to the plaintiff \$1,509.45, on account of lumber sold and delivered to plaintiff's agent, M. A. Sweeney, a bill of particulars of which is attached hereto, filed herewith, and made a part hereof, which said sum of \$1,509.45 is due the plaintiff from the defendant and is wholly unpaid. Wherefore plaintiff asks judgment for \$1,509.45 and all proper relief.

[Signed] C. P. & J. D. FERGUSON,
Attorneys for Plaintiff.

"Bill of Particulars.
1894.

March 31,	to	lumber	as	per	bill	rendered	\$124.68
"	"	"	"	"	"	"	515.64
April 14,	"	"	"	"	"	"	207.28
" 20,	"	"	"	"	"	"	538.77
" 24,	"	"	"	"	"	"	382.80
								<hr/>
								\$1,769.17

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April 14, By invoice for car of cement.	\$82.50	
Aug. 15, By freight receipt.....	57.78	
" " " " "	48.06	
" " " " "	71.38	\$259.72
		<hr/> \$1.509.45."

A demurrer was filed to this complaint and overruled by the court below. There was a trial by the court, and at the request of the appellant the court found the facts specially and stated its conclusions of law thereon, and rendered judgment against appellant for the sum of \$1,479.45. From this judgment the appeal is prosecuted here, under the following assignment of errors:

1st. That the complaint does not state facts sufficient to constitute a cause of action.

2d. The court erred in overruling the demurrer to the complaint.

3d. The court erred in the conclusion of law stated upon the special finding of facts.

4th. The court erred in overruling appellant's motion for a new trial.

It is urged by counsel that the complaint in the cause is insufficient. The fact that the word plaintiff is used where it is plain that the pleader meant to use the word defendant, will not vitiate the pleading, but this court will give the pleading the force which the proper word would have given it if the mistake had not been made.

In the case of *Indiana, etc., R. W. Co. v. Dailey*, 110 Ind. 75, the word plaintiff was used by the pleader where it was plain he intended to use the word defendant, and in commenting upon counsels' contention, that the word should be read as the pleader had written it, the court said: "Merely clerical mistakes, such as the use of one word or one name for another,

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where, as in this case, there is and can be no possible room for doubt as to which one of the two words or names the pleader intended to use, will not and ought not to vitiate the pleading in any court, under the statutory rule that 'its allegations shall be liberally construed, with a view to substantial justice between the parties.' " See, also, *Warbritton v. Demorett*, 129 Ind. 346; *Landon v. White*, 101 Ind. 249.

Substituting the word defendant for the word plaintiff, before the word agent, in the complaint, the allegation then is, in substance, that defendant is indebted to plaintiff for lumber sold and delivered to M. A. Sweeney, defendant's agent. It is not charged in the complaint that such sale was made to M. A. Sweeney, defendant's agent acting as such agent, or that the goods were sold to Sweeney for the defendant, or upon his order, or that such sale was made to Sweeney at the instance or request of defendant, or that the goods were sold to Sweeney, or to any one, upon defendant's credit. When we look to the bill of particulars it throws no further light upon the subject and fails in any way to aid the complaint. The body of the bill of particulars is very properly made out, but it is nowhere stated therein to whom or from whom the various amounts stated therein are owing.

The case of *Rend v. Boord*, 75 Ind. 307, cited by counsel for appellee, does not sustain their position. In that case, the allegation of the complaint was, "that they [defendants] were partners, and as such were indebted to him [plaintiff] for goods sold and delivered to one Mehan, their agent, for them and upon their order." This allegation the court held, and we think properly, sufficient to charge the defendant with the indebtedness for the goods so sold and delivered to Mehan.

There must be something more than the mere naked

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allegation of indebtedness to render a defendant liable, and if, as in a case of this kind, the allegation is of a sale to some person other than the defendant, for which sale it is expected to hold the defendant liable, such facts must be averred by the pleader as would render the defendant liable for a sale made to the third party. It is essential in all pleading that the party presenting the same as a claim or defense, allege every substantive fact which is necessary to the maintenance of his suit or defense, and if any such fact is omitted, the claim or defense is necessarily defective.

We think the court erred in overruling the demurrer to the complaint.

Other alleged errors are discussed by appellant's counsel, but on account of the conclusion already reached we deem it unnecessary to pass upon them.

The judgment is reversed, with instructions to sustain the demurrer to the complaint.

CONCURRING OPINION.

BLACK, J.—I concur in the decision, that the complaint was insufficient on demurrer, but I do not think it necessary to decide the dispute concerning the words "plaintiff's agent." The entire complaint, including its exhibit, is set out in the opinion of the majority of the court, for the purpose of showing that it alleged a sale and delivery to M. A. Sweeney. It is assumed that the pleader meant to describe him as the defendant's agent. It is not clearly manifest upon the face of the complaint that he was the defendant's agent, or that the pleader should have so described him, or intended to do so.

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BYERS v. THE UNION CENTRAL LIFE
INSURANCE COMPANY.

[No. 2,118. Filed February 24, 1897.]

CORPORATIONS.—*Action Against a Foreign Corporation by Its Agent.*

—*Jurisdiction.*—*Statutes Construed.*—Under sections 8453 and 8454, Burns' R. S. 1894, providing that agents of foreign corporations shall deposit in the county clerk's office the power of attorney or other authority by virtue of which they act, and that such agents shall procure from such corporations and file with the clerk a duly authenticated order or resolution of the managers of such corporations, authorizing any "citizen or resident" of this State having a claim against such corporation, arising out of any transaction in this State with "such agents", to maintain in this State an action thereon, an agent of a foreign corporation can not maintain an action against such corporation on a check drawn to his order and payable in a foreign state. *pp. 102-105.*

SAME.—*Action Against a Foreign Insurance Company by Its Agent.*—

Jurisdiction.—*Statute Construed.*—Under section 4916, Burns' R. S. 1894, providing that it shall be unlawful for a foreign insurance company to do business in this State until it has filed with the Auditor of State a certified order of the board of directors of such company consenting that service of process in any court against such company may be served on any authorized agent of the company in the State while any liability remains outstanding against the company in the State, an agent of a foreign insurance company can not maintain an action against such company on a check drawn to the order of such agent and payable in another State. *p. 105.*

JURISDICTION.—*When May be Presented by Motion to Dismiss.*—

Where the want of jurisdiction appears on the face of the complaint, the question may be presented by motion to dismiss. *p. 107.*

From the Allen Superior Court. *Affirmed.*

Samuel M. Hench, for appellant.

Charles W. Kuhne, for appellee.

COMSTOCK, C. J.—The appellant instituted this action against appellee upon a check of \$53.74, payable to his order, and drawn by said company at Cincin-

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nati, Ohio, upon the National Lafayette Bank of that city.

The first paragraph of complaint was dismissed. The four remaining paragraphs substantially aver that the appellee is a corporation organized under the laws of the state of Ohio; that plaintiff was in the employ of defendant as an agent to solicit life insurance for said company in Allen county, Indiana; that said defendant agreed to pay plaintiff for his services as such solicitor 50 per cent. of the premium paid by persons insured in said company on his solicitation as agent; that the agreement was made in Indiana; that plaintiff, as such agent, solicited one John Baker to take a \$3,000.00 life insurance policy in said company, and that plaintiff is entitled to commission of \$53.74 for soliciting such business; that defendant delivered a check for said amount to the plaintiff in payment thereof, drawn by said company at Cincinnati, Ohio, on the National Lafayette Bank of that city; that payment thereupon was refused. A copy of the check is set out in each paragraph except the third and fifth. The fifth paragraph recites the same facts, but counts on the commission merely.

The appellee appeared specially and moved the court to dismiss the cause, for the reason that the court had not jurisdiction of the person of the defendant; that the summons therein, as shown by the return of the sheriff endorsed thereon, was served on Charles E. Everett, described in said return as the agent of the Union Central Life Insurance Company; and further, that defendant was a foreign corporation, domiciled in the state of Ohio, incorporated by its charter to do general life insurance business; that the cause of action sued on is for commission alleged to be due the plaintiff of the defendant for soliciting an insurance and risk as agent for the defendant, and

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upon a check, payable to the plaintiff, alleged to have been given to him by the defendant for said commission, and is not founded upon a contract of life insurance entered into by the defendant, or upon any cause of action under the provisions of the Act of 1883, relating to foreign insurance companies doing business in this State. Said motion was sworn to by the agent of the department.

The court sustained the motion and dismissed the cause.

The action of the trial court is assigned as error in this court by appellant.

At common law a corporation must be sued in such an action as this in the jurisdiction of its domicile. All statutes authorizing such suits elsewhere are in derogation of the common law, and should not be extended beyond their manifest meaning.

In declaring what is necessary in bringing suits against foreign corporations, we must look almost entirely to the statutes of our State.

Section 316, R. S. 1881, providing the method of bringing a foreign corporation into court sitting in the territory where the corporation does business, by service upon its agents, provides "that process shall not be served upon any such person, officer, or agent when he is plaintiff in the suit, but, in such cases, process shall be served upon some other such person, officer, or agent of the corporation than such plaintiff; and in case the defendant be a foreign corporation, having no such person, officer, or agent resident in the State, service may be made in the same manner as against other nonresidents."

Section 3453, Burns' R. S. 1894 (3022, R. S. 1881), reads as follows: "Agents of corporations not incorporated or organized in this State, before entering upon the duties of their agency in this State, shall de-

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posit in the clerk's office of the county where they propose doing business therefor the power of attorney, commission, appointment, or other authority under or by virtue of which they act as agents."

Section 3454, Burns' R. S. 1894 (3023, R. S. 1881), is as follows: "Said agents shall procure from such corporations, and file with the clerk of the circuit court of the county where they propose doing business, before commencing the duties thereof, a duly authenticated order, resolution, or other sufficient authority of the board of directors or managers of such corporations, authorizing citizens or residents of this State having a claim or demand against such corporation arising out of any transaction in this State with such agents, to sue for and maintain an action in respect to the same in any court of this State of competent jurisdiction, and further authorizing service of process in such action on such agent to be valid service on such corporation, and that such service shall authorize judgment and all other proceedings against such corporation."

Section 1, of an act approved March 5, 1883, section 4916, Burns' R. S. 1894 (3781a, Horner's R. S. 1896): "It shall not be lawful for any insurance company chartered, organized, or incorporated in any other state or nation to do business in the State of Indiana, until such company shall file with the Auditor of State a certified copy of a vote or resolution of the board of directors of such company consenting that service of process in any suit against such company may be served upon any authorized agent of such company in the State of Indiana, with like effect as if such company was chartered, organized or incorporated in the State of Indiana, and agreeing that any process served upon such agent shall be of the same legal force and validity as if

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served upon said company, and agreeing that such service may be so made, with such effect, while any liability remains outstanding against such company in this State, and agreeing further, that if at any time there shall be no authorized agent of such company in the county where any suit shall be brought, service may thereafter be made upon the Auditor of the State of Indiana, with such effect as if made upon an authorized agent of such company."

We are of the opinion that sections 3022 and 3023, *supra*, were enacted for the purpose of giving citizens of Indiana the right to bring suit against foreign companies in the courts of this State on claims against such company arising out of any transactions in this State with such agents.

Under these sections the claim in suit could not be prosecuted in our courts, for the statute applies to transactions of residents with the agents of the company, and not to transactions between agents and the corporations.

Previous to the act of 1883, *supra*, we think no agent in Indiana could maintain an action against the foreign corporation which he represented upon a claim arising out of a transaction between him and his principal. It does not repeal previous legislation, except so far as it is in conflict therewith. These acts should be construed under the rule of statutory construction so that all will stand together, rather than that any should be held repealed. The object of the statute of 1883, is to extend the remedy of the residents of this State having claims growing out of transactions with agents of foreign insurance companies, so that they may bring suits in this State "while any liability remains outstanding against such company in this State," although the corporation may have ceased to do business here, and when it may no

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longer have an authorized agent in the county where the suit is brought.

In *Rehm v. German, etc., Saving Inst.*, 125 Ind. 135, appellee was a foreign insurance company having its habitation in the State of Illinois. Appellants were residents of the State of Indiana, doing business as general insurance agents in the city of Indianapolis; they became the agents of the appellee, and, claiming that appellee had broken its contract with them, brought suit in the superior court of Marion county upon said contract. In the opinion given by Berkshire, C. J., the court says: "In our opinion said sections * * 3022 and 3023 do not enter into the construction to be given to the act of 1883. They relate to foreign corporations in general, and have no application to such corporations as are under special regulations.

"For many years foreign insurance companies doing business in this State have been under regulations applicable to such companies, but to no other corporations, and the act of 1883 makes full and ample provisions therefor. * * * That such special legislation excepts insurance companies from the effect of other statutes upon the subject of foreign corporations doing business within the State is a proposition too well settled to require the citation of authorities."

The court further says: "their cause of action did not arise out of any business transaction within the purview of the statute. * * * The contract is an ordinary common law contract, whereby the appellants agree to serve the appellee in a particular manner for a certain compensation. We think the action is controlled by the rules of the common law, and could only be maintained in a forum within the place of the appellee's domicile."

In the case at bar, the contract sued on is not one

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of insurance; it is a claim growing out of services rendered the company. The contract in *Rhem v. German, etc., Saving Inst., supra*, and the contract in the suit at bar are common law contracts for services. Neither are upon a contract of insurance under the purview of the statutes of 1883, *supra*, as interpreted by the Supreme Court in *Rhem v. German, etc., Saving Inst., supra*.

Cross-errors were assigned by appellee, but as we do not deem it necessary to consider them, we have not set out the part of the record which relates thereto.

While questions of jurisdiction are, as a general rule, raised by demurrer or pleas in abatement, we are of the opinion that when, as in this case, the want of jurisdiction appears upon the face of the complaint, and the sustaining of a motion to dismiss the action accomplishes the same result, the question may be presented by motion to dismiss. *Gilbert v. Hall*, 115 Ind. 549.

Judgment affirmed.

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[No. 2,050. Filed February 24, 1897.]

INTOXICATING LIQUORS.—*License to Sell Not Transferable.*—A license to sell intoxicating liquors at retail is not transferable. *p. 113.*

CONTRACTS.—*Consideration.*—Mere inadequacy of consideration is not sufficient to defeat a contract. *p. 115.*

SAME.—*Valid and Illegal Considerations in Same Contract.*—Where valid and illegal considerations in the same contract are susceptible of division, that part of the consideration which is legal may be enforced. *pp. 116–118.*

APPEAL.—*Harmless Error.*—Error cannot be predicated upon the ruling on one paragraph of a pleading, where there are other paragraphs under which the same evidence would be admissible. *pp. 118, 119.*

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From the Wells Circuit Court. *Affirmed.*

Levi Mock, John Mock, George Mock, A. L. Sharpe and C. E. Sturgis, for appellant.

Joseph S. Dailey, Abram Simmons, Frank C. Dailey, John K. Rinehart and M. W. Walbert, for appellee.

WILEY, J.—The assignments of error in this case call in question the correctness of the ruling of the court in overruling appellant's demurrer to the first and second paragraphs of the complaint, and in sustaining appellee's demurrer to the second paragraph of appellant's answer. To the end that the questions involved may be fully understood and fairly presented, it is necessary to embody in this opinion the sum and substance of the various pleadings upon which we are asked to pass judgment.

The complaint was in two paragraphs. In the first paragraph it is alleged that on or about March 28, 1893, the appellant and appellee entered into a co-partnership for the purpose of conducting and operating a saloon in Bluffton, Indiana; that they purchased of one Mattie McKendry the fixtures and stock owned by her, and gave their three joint notes therefor, as follows: One for \$125.00, one for \$225.00, and one for \$250.00, all with 8 per cent. interest and attorney's fees; that in pursuance of said contract, appellant and appellee operated the said saloon as partners until June 22, 1893, when a dissolution took place, and they executed a written contract, by the terms of which appellee sold all of his interest in said saloon and fixtures to the appellant, and in consideration thereof, the appellant assumed and agreed to pay and discharge the said notes, and was to pay all bills and accounts for said stock, etc., including all debts of said firm theretofore contracted; that before the maturity

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of said notes said McKendry, for a valuable consideration, transferred the second of said notes to Ashbaucher & Brother, partners, and the third of said series to one Bender; that when said notes became due, appellant failed to pay them, and also failed to pay any of the outstanding bills or indebtedness for which said firm was liable; that the said appellant, under said contract, took possession of said saloon, and property, sold the goods on hand, and sold and transferred the saloon fixtures to one Hawk for \$200.00 in cash and a \$160.00 note, and upon the failure of said Hawk to pay said note, he again took possession of said saloon and sold the same to one Conrad, for \$300.00, and appropriated the money and proceeds of the business to his own use; that the said Ashbaucher & Brother sued appellant and appellee upon the note so transferred to them, and recovered thereon a judgment for \$264.64 and costs; that said Bender also recovered judgment on his note for \$265.00 and costs; that at the time of the rendition of said judgments, plaintiff was the owner of certain real estate in Wells county, Indiana, where said judgments were rendered; that certain other judgments were rendered in the Wells Circuit Court against appellant and appellee upon certain indebtedness which the appellant assumed and agreed to pay; that for the purpose of avoiding the sale of his real estate upon the judgments in favor of Ashbaucher & Brother, and Bender, he procured one Stimel, to become replevin bail thereon, and gave him a mortgage on his said real estate for \$600.00, the amount of said judgment, interest and costs, and also a note of \$100.00 which had been executed to said Stimel by appellant and appellee, and which appellant assumed and agreed to pay as a part of the consideration for the transfer of said saloon and fixtures •

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to him; that said Stimel foreclosed said mortgage, and sold said real estate upon the decree therein entered; that by reason of said judgments the plaintiff has become insolvent and his said real estate is so incumbered by reason of said judgments and liens that he is unable to pay any of said indebtedness, or to borrow money with which to pay said liens and judgments.

A copy of the contract between appellant and appellee, whereby appellee sold to appellant his interest in said saloon and fixtures, is filed with the complaint and is made a part thereof by exhibit.

The second paragraph of the complaint is so nearly identical with the first, except as to the prayer, that it need not be here set out. The contract, which is made an exhibit to the complaint, is as follows:

“Know All Men by These Presents, That I, P. P. Pierce, of Wells county, Indiana, in consideration of the sum of one hundred dollars, the receipt whereof is hereby acknowledged, have granted, bargained and sold, and do hereby grant, bargain and sell unto John Pierce, of Wells county, Indiana, all my right, title and interest in all furniture, fixtures and stock in the saloon now run in the building owned by Isaac Peppard, on Johnson street, in Bluffton, Indiana, and including the license or authority to sell now in force.

“It is hereby understood and agreed that the said John Pierce shall and does hereby assume the payment of three notes in the sum of \$453.00 and interest, payable to Mattie McKendry, as purchase money for said saloon; and also the said John Pierce assumes to pay all bills and accounts for stock now outstanding or which may hereafter become due and payable, including all debts of said firm as heretofore constituted.”

• The appellant challenged the sufficiency of each

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paragraph of the complaint by a demurrer, which was overruled, to which ruling he excepted. The appellant then answered in four paragraphs, but as the only question raised upon the answer by the assignment of error is the sustaining of the demurrer to the amended second paragraph of answer, it is unnecessary to refer to any of the other paragraphs of answer.

The amended second paragraph of answer is as follows:

“And for amended second paragraph of answer to the complaint, the defendant, John S. Pierce, says that the consideration for the contract sued on is immoral, illegal, and against public policy, in that the greater portion of said consideration was the transfer by the plaintiff to the defendant of his license to sell intoxicating liquors in Wells county, Indiana, which the plaintiff at the time had and continued to have for ten months thereafter; that the stock mentioned in said contract consisted of intoxicating liquors, then and there for sale, and that the other property mentioned in said contract, including said stock, was not worth any sum without said license to run and operate said saloon and make sales of intoxicating liquors; that at the time said contract was executed the plaintiff well knew that defendant had no means or other way of paying the obligations mentioned in said contract than to make sales of intoxicating liquors and run and operate said saloon, and it was expressly understood and agreed by the plaintiff and defendant that defendant was to sell intoxicating liquors, under said license and pay the several obligations mentioned in said contract out of the proceeds of such sales, and said sale and transfer mentioned in said contract was executed for the express purpose and with the intent, upon the part of the plaintiff and defendant, that defendant should sell intoxicating

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liquors under said liquor license; that the consideration of the said contract is so blended, that the value placed upon said liquor license, cannot be separated from the other considerations mentioned in said contract; that about the whole inducement to defendant to execute said contract was the privilege of selling such intoxicating liquors under said license, which defendant at the time believed said transfer conferred upon him."

After a reply in general denial to the affirmative matters in the answer, the cause was submitted to the court without a jury, and resulted in a judgment in favor of appellee for \$677.76. The evidence is not in the record, and appellant prosecutes this appeal solely upon the pleadings, and has assigned error as follows: (1) The court erred in overruling the demurrer to the first paragraph of the complaint; (2) the court erred in overruling the demurrer to the second paragraph of the complaint; and (3) the court erred in sustaining the demurrer to the amended second paragraph of answer.

As the same question is presented both by the complaint and second paragraph of amended answer, the several assignments of error may be considered together. Counsel for appellant present and discuss but one proposition, to-wit: that the contract sued upon, tested by the averments of the complaint and the second paragraph of amended answer, is an illegal one, and hence cannot be enforced. It is specially urged, under the averments of the second amended paragraph of answer, that as the transfer of the license to sell intoxicating liquors, by appellee to appellant, was illegal, and constituted a greater part of the consideration entering into the contract, that, that part of the legal consideration was so tainted and blended with the illegal part that the legal could not be sep-

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arated from the illegal, and that the contract was, therefore, not enforceable.

It is well settled in this State that a license to sell intoxicating liquors at retail is not transferable and confers on the transferee no authority to sell. *Strahn v. Hamilton*, 38 Ind. 57; *Heath v. State*, 105 Ind. 342. This rule is based upon sound principle. The law regulating the granting and issuing of a license to vend intoxicating liquors to be drank as a beverage, primarily clothes the board of county commissioners with the authority to determine who are fit persons to be intrusted with such business, and if a licensee had the power to transfer his license he could transfer it to whom he pleased, regardless of the fitness of the transferee to engage in so perilous and hazardous a business, and thus the object of the statute would be defeated.

If there had been no consideration for the contract in question, but the transfer of the license by the appellee to the appellant, we would have no difficulty in arriving at a conclusion, for, in such event, there would be no valid consideration to support the contract. There was no consideration moving to the appellant from the appellee for such transfer, and he is charged with the knowledge of that fact. He was bound to know that its transfer conferred upon him no right to sell intoxicating liquors thereunder, for all persons are presumed to know the law. In so far as the transfer of the license enters into or affects the transaction in question, the consideration therefor, if any, was a consideration impossible in law, because it could confer no rights, and a consideration, either impossible in law or physically impossible, is no consideration. Clark on Contracts, section 85, p. 181.

This infirmity in the contract was as much within

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his knowledge as it was within the knowledge of the appellee.

If there was any valid consideration, therefore, to support the contract, it must be held binding, if such consideration is of such a character that it may be distinguished from the illegal or void consideration.

As we have said before, the transfer of the license conferred no title or right in, or to it in the transferee, and he being bound to know that fact, then we must hold that such transfer constituted no part of the consideration, and we must look to and construe the contract as though the words "and including the license or authority to sell now in force" were wholly omitted therefrom. The contract avers that in consideration of \$100.00, the receipt of which is acknowledged, the appellee granted, bargained and sold to appellant all his right, title and interest in and to the furniture, fixtures and stock in the saloon, etc.; and in consideration of these covenants, on the part of appellee, appellant assumed and agreed to pay certain notes, accounts and debts for which they were both jointly and severally liable. True, the second paragraph of the amended answer avers that a greater part of the consideration was the transfer of the license by appellee to appellant, and that the stock mentioned in the contract consisted of intoxicating liquors then and there for sale, and that the other property mentioned in the contract was not worth any sum without said license to operate and run said saloon. This paragraph of answer was drawn with much skill, and it is evident that it was the intention of the pleader to state in substance that without the license to sell all the property, rights and choses in action mentioned in the contract, were without value, and hence there would be no consideration to support it. Unfortunately, however, for the pleader, he has failed in this. The an-

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swer avers that the "stock mentioned in the contract consisted of intoxicating liquors then and there for sale," but it does not aver that without the license to sell they were of no value. It is only the "*other property mentioned in the contract*" that was without value in the absence of the right to sell under the license. It must be presumed, nothing to the contrary appearing, that the stock of liquors had some value, and where there is some consideration to support the contract it will be upheld. Mere inadequacy of consideration is not sufficient to defeat a contract. *Sibbitt v. Stryker*, 62 Ind. 41. Where a person obtains all the consideration he contracts for, he cannot say there was no consideration. *Laboyteaux v. Swigart*, 103 Ind. 596.

In the case at bar, the appellant, having been bound to know that no benefit would accrue to him under the transfer of the license, and there being some consideration to support the contract, it must be presumed he obtained all the consideration for which he contracted.

We think the case of *Strahn v. Hamilton*, *supra*, is decisive of the case under consideration. In that case, the appellant sold appellee a saloon, stock and fixtures, furniture, etc., and transferred to him his license to sell intoxicating liquors. In an action to recover under his contract for the purchase price, the defense was interposed that there had been partial failure of consideration, in that the transfer of the license to sell was valued at \$100.00, and as it was not transferable, and gave the transferee no right to sell, and resulted in no benefit to him, to that extent there was a failure of consideration. The appellant in that case was the plaintiff below, and recovered the contract price, less the \$100.00, the value attached to the license. On appeal the judgment was affirmed. It

was clearly recognized by the Supreme Court in that case that a part of the consideration being illegal, and a part of it legal, under the pleading, it was susceptible of division, and it was rightly held that that part of the consideration which was legal could be enforced.

As the evidence is not in the record in the case at bar, and as there was a transfer of property, rights, and choses in action by appellee to appellant, that was of some value, which would constitute a valid consideration, it is fair to presume that the court wholly disregarded the question of the transfer of the license and based its judgment upon the valid consideration expressed in the contract. In the absence of the evidence every presumption must be indulged in favor of the action of the trial court, and we cannot say that it did not reach a correct conclusion.

We are not unmindful of the rule that where valid and illegal considerations in a contract are so blended and intermingled that they cannot be separated, the contract cannot be enforced, but the rule is not applicable here, because they are clearly divisible. The cases appellant cites in support of the proposition are not in point. *Fleming v. Greene*, 48 Kan. 646, 30 Pac. 11, cited by appellant, was where promissory notes and a mortgage were given for the excess over a certain sum upon an invoice of goods which was found to have been made by the payee of the notes and another, with the intention of cheating and defrauding the purchasers, and the signatures to such notes and mortgage were actually obtained by means of such false and fraudulent inventory; and upon these facts it was held by the supreme court of Kansas that the transaction was unlawful, and that the consideration of such notes and mortgage was illegal, and that for that reason they were held void. It will be observed

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from the facts stated in that case, that the whole transaction was tainted with fraud, and under the well settled rule that fraud vitiates all contracts, the contract in that case was held to be void.

Boehmer v. Foval, 55 Ill. App. 71, also cited by appellant, was an action for a reward offered, and as the reward was payable in the event of a successful termination of the action, and one of the considerations was that the plaintiff should testify and get others to testify against the party against whom an embezzlement had been charged, and where it was sought to recover the amount embezzled, it was held that the contract was illegal and void on the ground that agreements relating to proceedings in civil courts, involving anything inconsistent with the full and impartial course of justice, though not open to the actual charge of corruption, could not be enforced as being against public policy. This doctrine is certainly founded in sound reason, but it has no application to the facts in this case.

Wolsey v. Neeley, 62 Ill. App. 141, cited by appellant, in support of his contention, was where a contract was entered into giving the entire option to sell the stock of an incorporated company for a future delivery, and it was held that it was in direct violation of a criminal statute of the state defining such transactions as gambling contracts. In the same case, however, it was held that where a contract, void under the criminal code, contained other provisions which are not void and which are valid, such provisions may be enforced. The case just cited is in direct harmony with the great weight of authorities upon the proposition, and especially is it in harmony with the case of *Strahn v. Hamilton*, *supra*.

Counsel for appellant quote from *Edwards County v. Jennings* (Tex. Sup.), 35 S. W., 1053, in support of the

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proposition that where legal and illegal provisions are contained in a contract, that the contract cannot be enforced. We have examined that case with very much care, and are led to the conclusion that counsel cited it without the text of the opinion before them and, therefore, not fully comprehending its full import and meaning. The commissioners of Edwards county, in the State of Texas, contracted with Jennings to put in the town of Rock Springs a certain water system, and in the contract granted to him "an exclusive right of way to lay pipe, etc., in the streets." The constitution of Texas, Article 1, section 26, provides that "Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed;" and as the agreement tends to create a monopoly it was violative of the constitution, illegal and void.

The consideration for the obligation imposed upon Jennings by the contract consisted of the obligation of the county (1) to pay him \$3,500, and (2) to perform this unlawful agreement.

With this brief statement of the case, it is apparent that it does not support the contention of appellant, for it is obvious that the whole contract, or the substance of it at least, is merged in the unlawful agreement granting to Jennings an exclusive right of way to lay pipes in the streets, etc. The entire contract must fail in the absence of the right to lay pipes, etc., for a water system in a town without pipes or mains through which to conduct the water, would not be operative.

We reiterate, therefore, that in our judgment the contract sued upon in this case is not subject to the objection urged against it.

But, if we are wrong, still there was no error prejudicial to the appellant in sustaining appellee's demur-

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rer to the amended second paragraph of answer, for the reason that error cannot be predicated upon the ruling on one paragraph of a pleading, where there are other paragraphs under which the same evidence would be admissible. Under the third and fourth paragraphs of appellant's answer we are clearly of the opinion that the facts charged in the amended second paragraph of answer were admissible in evidence. In our judgment each paragraph of the complaint stated a good cause of action.

We find no error in the record, and the judgment is affirmed.

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[No. 2,094. Filed Nov., 5, 1896. Rehearing denied Feb. 24, 1897.]

APPEAL AND ERROR.—*Weight of Evidence.*—The Appellate Court will not weigh the evidence nor reconcile conflicts therein. *p. 120.*

SAME.—*Instructions.—Practice.*—It is not error to refuse to give to the jury an instruction offered by counsel where it is not shown that the instruction asked and refused was signed by counsel. *p. 120.*

TRIAL.—*Evidence.—Impeachment.*—Evidence of the general reputation of a witness for truth and veracity in the neighborhood in which he formerly lived is competent which follows evidence of a like nature as to his reputation where he then lived. *p. 121.*

EVIDENCE.—*Admissibility of Testimony of Shorthand Reporter from Notes of Former Trial.*—The official shorthand reporter may testify from recollection, refreshed by her notes as to statements made by a witness at a former trial reported by her. *p. 121.*

PRACTICE.—*Cross-Examination of Witness.—Discretion of Court.*—The extent to which a cross-examination of a witness may be carried is within the sound discretion of the court, and unless there is manifest abuse of such discretion its exercise by the trial court will not afford sufficient ground for a reversal of the judgment. *p. 122.*

SAME.—*Misconduct of Counsel.*—In order to save any question as to the misconduct of counsel during the trial, the trial court must be called upon by the aggrieved party in some manner to correct the injury. *pp. 122, 123.*

From the Montgomery Circuit Court. *Affirmed.*

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W. G. Houk and M. W. Bruner, for appellant.

Thomas & Whittington, for appellee.

DAVIS, C. J.—This was an action to recover damages for an alleged assault on the appellant by the appellee.

On issues joined a verdict was returned by the jury in favor of appellee, on which judgment was rendered.

The only error assigned is the overruling of appellant's motion for a new trial.

The first question discussed is that the verdict of the jury is not supported by the evidence. On this proposition it will suffice to say there is ample evidence in the record to sustain the verdict. It is true the evidence is conflicting, but it is not our province to weigh the evidence or to reconcile conflicts therein. *Campbell v. Conner*, 15 Ind. App. 23; *Haines v. Porch*, 9 Ind. App. 413; *Miles, Tr., v. DeWolf*, 8 Ind. App. 153; *Zimmerman v. Snyder*, 6 Ind. App. 178.

The next question discussed relates to the refusal of the court to give to the jury an instruction asked by appellant. It is not shown that the instruction asked and refused was signed by counsel, and, therefore, there was no error in refusing to give it. *Louisville, etc., R. W. Co. v. Goben*, 15 Ind. App. 123.

It is next urged that the court erred in giving certain instructions asked by appellee. The instructions were applicable to the evidence and correctly state the law and, therefore, there was no error in giving them. It may be true they were not in all respects correct statements of the law, applicable to appellant's version of the occurrence, but they were correct statements of the law applicable to appellee's version of the occurrence. Moreover, the instructions given to the jury by the court, when considered as an entirety, were not unfavorable to appellant.

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The next question discussed relates to the testimony of the witness, Hanna, as to the general reputation of appellant for truth and veracity in the community in which he lived.

An objection was made because the question did not apply to the general reputation of appellant for truth and veracity "where he now lives," but no exception was reserved to the ruling of the court.

Moreover, it appears that several witnesses testified that his general reputation for truth and veracity was bad at the time of the trial in Crawfordsville where he then lived, and in this connection it was competent to prove that his general reputation for truth and veracity was bad in the neighborhood, in that county, from which he moved to Crawfordsville several years before the trial, by witnesses who had familiarly and continuously known him during all of those years. He and his wife owned real estate in that neighborhood, he was frequently there, and the difficulty out of which this lawsuit arose occurred in that neighborhood. *Memphis, etc., Packet Co. v. McCool*, 83 Ind. 392; *Sage v. State*, 127 Ind. 15, 27; *Pape v. Wright*, 116 Ind. 502.

It is next urged that the court erred in permitting the stenographer to testify from her shorthand notes as to statements made by appellant on a former trial. The witness testified that she was the official shorthand reporter of said court; that her notes of the testimony of appellant were taken by her at the time he testified on the former trial and that they were correct.

The witness was then asked, on her original examination in chief, whether appellant, on the former trial, made a certain statement. An objection was made to the question, on the ground that she could not testify from her shorthand notes. The question, how-

ever, did not purport to elicit an answer from her shorthand notes. The objection was overruled and the witness answered, "Yes, sir." It was afterwards developed, on cross-examination and re-examination, that she was testifying from her recollection as refreshed by her notes, but that independently of her notes she had no distinct remembrance of his testimony.

Assuming that the question is properly presented for our consideration, we are of the opinion that her testimony was competent. *Bass v. State*, 136 Ind. 165.

The action of the trial court in refusing to allow counsel for appellant to continue the cross-examination of the witness, Elbert Randall, was not such an abuse of discretion as to authorize a reversal of the judgment of the trial court.

The examination in chief covers three pages and the cross-examination, nine pages. The witness was a boy fourteen years of age, and his examination in chief was confined exclusively to a description of what he saw of the encounter between appellant and his father. A reading of the cross-examination convinces us that the court was justified in refusing to allow counsel to further prolong it. It is a well recognized rule that any fact tending to impair the credibility of the witness by showing his interest, bias, ignorance, motives, or that he is depraved in character, may be elicited on cross-examination; but the extent to which such cross-examination may be carried is within the sound discretion of the court, and unless there is manifest abuse of such discretion, its exercise, by the trial court, will afford no sufficient ground for the reversal of the judgment. *Hinchcliffe v. Koontz*, 121 Ind. 422; *Staser v. Hogan*, 120 Ind. 207, 220; *Ledford v. Ledford*, 95 Ind. 283; *Wachstetter v. State*, 99 Ind. 290.

Counsel insist that the motion for a new trial

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should have been sustained because of alleged misconduct of counsel for appellee, in argument.

No objection was made in behalf of appellant in relation to the argument. No ruling was made by the court concerning such argument. No exception was reserved at the trial by appellant on this question.

The contention is that without objection or exception, on the part of appellant during the argument, he is entitled to a new trial, because of the alleged improper statement made by counsel for appellee in his argument to the jury.

It is well settled that in order to save any question in relation to the misconduct of counsel, the trial court must be called upon by the aggrieved party in some manner to correct the injury. *Pittsburgh, etc., R. W. Co. v. Welch*, 12 Ind. App. 433; *Maybin v. Webster*, 8 Ind. App. 547; *Chicago, etc., R. R. Co. v. Champion*, 9 Ind. App. 510.

We have fully discussed this question on former occasions in the authorities cited, and especially in the opinion on petition for rehearing in *Maybin v. Webster, supra*.

We find no reversible error in the record.

Judgment affirmed.

VOLUNTARY RELIEF DEPARTMENT OF THE PENNSYLVANIA LINES WEST OF PITTSBURGH v. SPENCER.

[No. 1899. Filed February 25, 1897.]

ACCIDENT INSURANCE.—*Railroad Relief Association.—Complaint.—*

A complaint in an action against a railroad relief association alleging that on a specified day plaintiff met with an accident wholly without any cause or negligence on his part, and that he had fully complied with all the terms of his contract, negatives the idea that he violated any condition precedent to recovery under the rules of the association. p. 125.

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SAME.—*Railroad Relief Association.—Answer.*—An answer, in an action against a railroad relief association, setting up that the accident for which plaintiff sued did not occur to plaintiff while in the performance of the duties of his employment as required by the rules of the association, but resulted from plaintiff voluntarily and unnecessarily exposing himself to danger, when off duty, and while seeking his own pleasure, is demurrable as stating conclusions instead of facts. *pp. 126, 127.*

SAME.—*Rules of Railroad Relief Association, When Void.*—A rule of a railroad relief association which makes any decision of the advisory committee, with regard to an accident to a member, final and conclusive upon all parties, without exception or appeal, is void as an attempt to cut off the right to resort to the courts. *pp. 127, 128.*

SAME.—*Valid Rules of Relief Association.*—The requirement that the holder of a certificate of membership in a railroad relief association, in the event of a controversy between such holder and the association in reference to an indemnity claim, shall submit the same to the superintendent for determination, is a condition precedent which the holder must show he performed before bringing suit, or show a valid reason for its nonperformance. *p. 128.*

PLEADING.—*Answer.—Abatement.*—Matter in abatement, showing that the action was prematurely brought, cannot be pleaded with an answer in bar. *p. 129.*

INSTRUCTIONS.—*As to Evidence Equally Balanced.*—An instruction that if upon a fact the evidence is equally balanced, that fact is not proved and should not be stated in the special verdict, is proper. *p. 131.*

From the Cass Circuit Court. *Affirmed.*

N. O. Ross. G. W. Funk and D. H. Chase, for appellant.

F. M. Kistler, G. S. Kistler, S. T. McConnell and A. G. Jenkins, for appellee.

ROBINSON, J.—Appellee held a certificate of membership in appellant association, alleged in the complaint to be a corporation. The rules and regulations of the association, which were a part of the certificate, contained a stipulation to the effect that if the appellee while an employe of the Pittsburgh Cincinnati, Chicago and St. Louis Railway Company, should become disabled by sickness or by injury, other than an

accident, in the service of the employer, he should be entitled to certain disablement benefits. This action was brought to recover benefits while disabled for service, from an injury. The certificate of membership was embodied in the complaint, and the rules and regulations of the association were filed with the complaint as exhibits.

The first objection to the complaint is that it does not allege that the injury complained of was received at a time when appellee was not intoxicated, or off duty on account of intoxication, and not engaged in an unlawful act.

The appellee set forth in his complaint that on a certain day he met with an accident, wholly without any cause or negligence on his part, whereby his left leg was broken, just above the ankle joint, by reason of which he was unable to enter upon his duties; that he had given notice and proofs of the injury, according to the requirements of the rules and regulations of appellant, and that he had fully complied with all the terms of his contract. We think these allegations negatived the idea that he had violated any condition precedent contained in the rules. If appellee had, in fact, violated some rule that would prevent a recovery, such violation would properly be matter of defense.

It is provided in section 373, Burns' R. S. 1894, that "In pleading the performance of a condition precedent in a contract, it shall be sufficient to allege, generally, that the party performed all the conditions on his part."

Such general averment has been held sufficient as to the condition of a policy of insurance. *Louisville Underwriters v. Durland*, 123 Ind. 544, 7 L. R. A. 399. See *Phenix Ins. Co. v. Golden*, 121 Ind. 524; *Commer-*

cial Assur., etc., Co. v. State, ex rel., 113 Ind. 331; *Watson v. Deeds*, 3 Ind. App. 75.

In addition to the general denial the appellant answered in three paragraphs; to the third and fourth paragraphs demurrers were sustained. The demurrer to the second paragraph was overruled. The second paragraph sets out rule 52 of the appellant, which rule provides that "benefits will not be paid for disability arising from sickness contracted, and injuries received by members while intoxicated, or off duty in consequence of intoxication, or from injuries received while engaged in unlawful acts; or, for disease or death resulting from their immoralities, or from the intemperate use of stimulants or narcotics, or for death by the hands of justice;" and it is alleged that appellee was intoxicated at the time of the injury, and was further engaged in an unlawful act, which is set out in the pleading.

The third paragraph is based upon rule 45 of the appellant, which rule provides that "payments on account of disablement by accident will only be made upon the disablement being shown to have resulted solely from accidents occurring to members in the performance of duty in the service, and to which they were assigned, or which they were directed to perform by proper authority, or in voluntarily protecting the property of the company in whose employ they are. This shall include accidents occurring to members at points upon the employing company's property, which they necessarily pass when going to and from work, and which do not result from their voluntarily or unnecessarily exposing themselves to danger. There must be exterior or other positive evidence of injury, and satisfactory evidence that it incapacitates the person for performing his duty in the service, or, when of a permanent character, to earn a livelihood

in an employment suited to his capacity; disablement from accident occurring otherwise than as aforesaid, will be classed with sickness." It is further alleged that said injury did not "occur to the plaintiff at any point on said railroad company's property, which the plaintiff necessarily had to pass when going to and from work, but that it did result from the plaintiff voluntarily and unnecessarily exposing himself to danger when off duty, and while seeking his own pleasure."

Appellant's brief says that "this answer is not good, as an answer to a complaint for injuries received under the provisions of rule 45, nor for injuries received under the conditions named in rule 52, unless the closing part of the answer makes it so."

The pleading states no facts that go to show that appellee was exposing himself to danger, when injured, or that at that time he was seeking his own pleasure. This paragraph is open to the objection that it states conclusions instead of facts.

The fourth paragraph of answer sets out rule 65 of the association, which provides that "all questions or controversies of whatever character, arising in any manner, or between any parties or persons in connection with the Relief Department, or the operation thereof, whether as to the construction of language or meaning of the regulations of the relief department, or as to any writing, decision, instruction, or acts in connection therewith, shall be submitted to the determination of the superintendent of the relief department, whose decision shall be final and conclusive thereof, subject to the right of appeal to the advisory committee within thirty days after notice to the parties interested, of the decision. When an appeal is taken to the advisory committee it shall be heard by said committee without further notice, at

their next stated meeting, or at such future meeting, or time as they may designate, and shall be determined by vote of the majority of a quorum, or more, present at such meeting, and the decision so arrived at by the advisory committee shall be final and conclusive upon all parties without exception or appeal." It is then alleged that the claim for which this action is brought was not submitted to the superintendent of the relief department, nor passed upon or decided by him nor by the advisory committee.

That part of rule 65 which makes any decision of a committee final and conclusive upon all parties without exception or appeal, and then attempts to cut off the right of a party to resort to the courts, is void. *Supreme Council, etc., v. Forsinger*, 125 Ind. 52, 9 L. R. A. 501.

The requirement that appellee should submit the matter in controversy between himself and appellant to the determination of the superintendent of the relief department, is a condition precedent which appellee must show he performed before bringing suit, or show a valid reason for its nonperformance. *Supreme Council, etc., v. Forsinger, supra*.

The appeal to the advisory committee is not obligatory, but is simply a right given to the party and is not a condition that must be performed before suit is brought. This rule is a part of the contract between the parties and it provides a general right of appeal, but it does not stipulate that the claimant for benefits shall appeal. If the decision of the superintendent of the relief department is adverse to the claimant he may appeal to the advisory committee, or he may proceed to enforce his claim in the usual method. The rule set out in the fourth paragraph does not say, nor can it be construed to mean, that upon an adverse decision of the superintendent of the relief depart-

ment the claimant shall then appeal to the advisory committee. If the claimant had a just demand and payment was refused, he had the right to enforce his demand in an ordinary action at law, unless he had abridged that right by contract. He had abridged his right to sue at once by his contract to the effect that he would first present his claim to the superintendent of the relief department, but there is nothing in the rule in question which shows a clear agreement, surrendering his right to sue before taking an appeal to the advisory committee. Had it been the intention to require the claimant to surrender his right to sue until after an appeal had been taken from the decision of the superintendent to the advisory committee, it could easily have been so declared. *Bauer v. Sampson Lodge, etc.*, 102 Ind. 262.

The matter pleaded in the fourth paragraph of answer tended to show that appellee's action was prematurely brought. It went in abatement of the action and was not available by plea in bar. Having been pleaded with an answer in bar and without verification it might have been struck out on motion. But as sustaining the demurrer accomplished the same result, no available error was committed. A plea in abatement tends only to defeat the cause of action for the time being, while a plea in bar disputes the very cause of action itself. The matter set out in this paragraph of answer was clearly in abatement and could not be pleaded with an answer in bar. Section 368, Burns' R. S. 1894 (365, R. S. 1881); *Alexander v. Collins*, 2 Ind. App. 176; *Hayne v. Fisher*, 68 Ind. 158; *Dwiggins v. Clark*, 94 Ind. 49.

In support of the motion for a *venire de novo*, appellant argues that the special verdict is defective in that it does not find the contents of the papers prepared

for an appeal to the advisory committee; that it does not find that the medical examiner had any authority to act in the matter as agent of appellant, and that it does not find that any proofs or papers relating to the claim were ever submitted to either the superintendent of the relief department or the advisory committee.

Whatever may have been the authority of the medical examiner generally, the finding very clearly shows that he acted in this case with the knowledge and consent of appellant. The jury found that appellee "was also treated by Dr. Wagner, the medical examiner and physician of the defendant company at Logansport, Indiana; that after plaintiff was injured, and treated by Dr. Wagner, as herein found, the plaintiff applied to the defendant through Dr. Wagner for the amount due him, under his certificate of membership, as herein found, and thereafter was notified by said Wagner that his claim had been rejected. And thereafter, the plaintiff, at the instance and under the direction of Dr. A. C. Leisher, successor to Dr. Wagner, as medical examiner for the defendant at Logansport, Indiana, had papers prepared by John M. Bliss, Clerk of the Cass Circuit Court, with which to appeal his claim to defendant's advisory committee, which were subsequently delivered by the plaintiff to Dr. A. C. Leisher, with instructions to forward to proper authorities, and subsequently said Leisher notified plaintiff that he had forwarded the papers prepared by Bliss aforesaid, and that he had received notice of the rejection of plaintiff's claim, and thereafter this suit was brought."

We have examined the evidence and while it is conflicting there is evidence to sustain the special verdict.

The court instructed the jury that, "If, upon any

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fact, the evidence is equally balanced, that fact is not proved and should not be stated in your verdict.”

This was not error. When a fact is found it is a finding that the party having the burden of the issue has proven that fact by a preponderance of the evidence; and the failure to find the existence of a fact is equivalent to a finding that the fact does not exist. *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327; *Pittsburg, etc., R. W. Co. v. Burton*, 139 Ind. 357.

We find no error in the record for which the judgment should be reversed.

Judgment affirmed.

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[No. 2,075. Filed February 25, 1897.]

CONTRACTS.—*Between Employer and Employe.—Construction—*A contract of employment, whereby the defendants agreed to pay plaintiff \$25.00 per month for a period of three months, “as it would take plaintiff that long to learn the business of defendants; that after said time defendants could afford to pay plaintiff more,” in the absence of a new contract did not entitle plaintiff to wages in excess of \$25.00 per month for the time he remained in defendants’ employment after the expiration of the three months.

From the Posey Circuit Court. *Affirmed.*

F. P. Leonard, for appellant.

G. V. Menzies, for appellees.

HENLEY, J.—Appellant was the plaintiff below. The complaint was in one paragraph. The court sustained a demurrer thereto and appellant refusing to plead further, judgment was rendered against him. The only error assigned in this court is the overruling of the demurrer to appellant’s complaint.

The complaint avers, in substance, that on the 1st day of October, 1886, appellees were partners and were engaged in the business of cutting and selling lumber and staves at Mt. Vernon, Indiana; that appellees employed appellant on October 1, 1886, to work for them generally, in and about their said business; that appellees agreed to pay appellant the sum of \$25.00 per month from said 1st day of October, 1886, to the 1st day of January, 1887, "as it would take him, plaintiff (appellant), that long to learn the business of defendants (appellees); that after said last date they, defendants (appellees), could afford to pay plaintiff (appellant), more;" that appellant entered into the employment under the agreement aforesaid and continued to work for said appellees up to and until the 31st day of October, 1890; that during said time appellees paid appellant sums of money of sufficient amount to fully pay appellant, at the rate of \$25.00 per month, for all the time he so worked under said agreement; that appellant's services were worth the sum of \$50.00 per month from January 1st, 1887, to October 1st, 1891, and that under said agreement aforesaid, appellant demands judgment against appellees for the difference between the sum of \$25.00 per month and the sum of \$50.00 per month, from January 1, 1887 to October 1, 1891.

It will be seen by the complaint that appellant acknowledges the receipt of wages for the entire time which he worked for appellees at the rate of \$25.00 per month. The question is, does the agreement as set up in the complaint make it binding on appellees to pay any greater compensation to appellant after January 1, 1887? The complaint does not aver that appellees ever agreed to pay appellant an increase of wages after January 1, 1887, or at any time; it only avers that appellees said, that after that time they "could

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afford to pay him more.” When that time came it appears that no new agreement was entered into, appellant was not demanding an increase of wages, but continued to work under the agreement of October 1, 1886, and received his wages at the rate of \$25.00 per month for a period of more than three consecutive years. If the matter of an increase of wages was ever mentioned by the appellant to appellees during this time, it does not so appear by the complaint.

The complaint does not state sufficient facts to justify any court in holding that there was a contract or agreement between appellant and appellees that appellant's wages was to be increased after January 1, 1887. The essential elements of an agreement were entirely absent—the promise of service upon one side, and the agreement to pay upon the other. It required both parties to make a contract; it is nowhere shown or attempted to be shown that the minds of the two contracting parties ever met upon the vital proposition in the case—the increase of wages.

This is not a case of suit upon the *quantum meruit*. There can be no doubt but that if appellant had entered the service of appellees without any agreement as to the wages to be paid him, he could in an action against them, have recovered the reasonable value of his services under all the circumstances; but, having entered the service of appellees, at wages fixed at \$25 per month by agreement between them, which compensation the appellant nowhere avers in his complaint was ever by agreement changed in any way, he cannot now be heard to complain because his labor at some time during the time he was employed to work for appellees may have become reasonably worth more than the stipulated price. The principles necessarily stated in the decision of this case are elementary and the citation of authorities is unneces-

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sary. The complaint does not state a cause of action and the judgment of the lower court must be affirmed. Judgment affirmed.

GERMAN-AMERICAN INSURANCE COMPANY v. SANDERS.

[No. 1,848. Filed February 26, 1897.]

INSURANCE.—Transfer of Policy.—When Transfer in Writing May be Waived.—Where a fire insurance policy provides that the consent of the company to transfer same must be endorsed on the policy such provision must be complied with unless waived, either expressly or by implication. pp. 137, 138.

SAME.—Transfer of Policy.—Equitable Assignment.—A complaint in an action on a fire insurance policy which alleges that at the time of the conveyance of the real estate on which the insured buildings were situated, the insurance company was notified thereof and consented and agreed that the policy of insurance should become payable to the grantee in case of loss; that it agreed to endorse the fact of said transfer in writing upon the policy, but that it neglected and failed to do so; and that the company then agreed that it would waive the endorsement on said policy, and that it should be valid, and payable to said grantee, states facts sufficient to show an equitable assignment of the policy to the grantee of the real estate. pp. 138, 139.

SAME.—Assignment of Policy.—Waiver Of.—Where an insurance company accepts the premium for unearned insurance on a fire policy, with knowledge that the real estate on which the insured buildings are situated has been conveyed, and having consented at the time of the conveyance that the loss, if any, should be payable to the grantee, the provision in such policy that the consent to the transfer must be in writing, endorsed on the policy, is thereby waived. pp. 139, 140.

APPEAL AND ERROR.—Bill of Exceptions.—Material Evidence Omitted From Record.—Where the record shows that material evidence introduced by the appellee is not embodied therein, a statement in the bill of exceptions that "This was all the evidence given in said cause," will not prevail, and questions arising upon the evidence will not be considered. p. 140.

SAME.—Record.—Longhand Manuscript.—How Incorporated in Bill of Exceptions.—It must affirmatively appear from the record that the longhand manuscript of the evidence was filed in the clerk's office before it was embodied in the bill of exceptions, and signed by the judge. pp. 140, 141.

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From Knox Circuit Court. *Affirmed.*

Smiley N. Chambers, Samuel O. Pickens and Charles W. Moores, for appellant.

W. A. Cullop, C. B. Kessinger, George G. Reily and J. W. Emison, for appellee.

COMSTOCK, C. J.—This is an action brought by the appellee against the appellant and Ida Dennison and Willis Robison upon a policy of fire insurance issued by appellant, whereby it insured the appellee, James Sanders, upon his dwelling house, upon certain real estate located in Knox county, Indiana.

The complaint avers, in substance, that in October, 1891, the plaintiff insured his dwelling house against loss from fire, from the 7th day of October, 1891, to the 7th day of October, 1894. The policy is made a part of the complaint. In March, 1893, plaintiff conveyed by warranty deed the real estate upon which the dwelling house was situate to Willis Robison, and notified the defendant company of said conveyance, to which it consented, and agreed that said policy should become payable in case of loss during the ownership by said Robison of said property, to him. The defendant company then and there agreed to endorse said fact of said transfer to the person to whom the same had become payable, in writing upon said policy. It neglected wholly to endorse the same on said policy. That said endorsement was not part of said policy was not the fault of plaintiff or said Robison, but wholly the fault or negligence of defendant company; that defendant company then and there informed plaintiff and said Robison that it would waive the endorsement of the same in writing thereon, and that said policy should be valid and payable to said Robison; that at the time of the fire said Robison owned the property and immediately made his proof

of loss in writing to said company, as required by the terms of the policy; but that defendant refused to adjust, settle or pay the same; that afterwards on the — day of — said Robison assigned all his interest in said policy, in writing, to the plaintiff; that at the time of the conveyance by him to Robinson, the note for premium on said insurance policy was due the defendant, and that after said conveyance, and with full knowledge of said transfer, the defendant collected said note from the plaintiff and surrendered it to him; that at the time of insurance, Ida Dennison held a mortgage on the property, which is still unpaid, and it was endorsed on the policy that the loss, if any, was payable to the mortgagee.

The policy contained the following, among other provisions: "If any change takes place in the title or possession of the property * * * or if the policy before loss be assigned without the consent of the company, endorsed thereon * * * this policy shall be void. It is further expressly covenanted by the parties hereto that no officer, agent or representative of this company shall be held to have waived any of the terms and conditions of this policy, unless such waiver shall be endorsed thereon in writing."

Appellant assigns as errors the overruling of the demurrer to the complaint, the overruling of appellant's motion for a new trial, and the overruling of appellant's motion in arrest of judgment.

The first objection made to the complaint is that it does not aver any transfer of the policy by James Sanders to Willis Robison. Appellant claims that this averment is essential to entitle the plaintiff to recover; that when he conveyed the property to Robison he ceased to have any interest in it, and by the terms of the policy it became void, unless the policy was assigned to the purchaser, and the consent of the

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company to such assignment was had by endorsement in writing upon the same.

New v. German Ins. Co., 5 Ind. App. 82, is cited in which the court uses the following language: "Insurance policies are contracts of indemnity and are essentially personal in their nature. They relate to the insured rather than to the subject-matter of insurance and at common law were non-assignable. * *

* An insured must have an interest in the subject of insurance or the policy will be held a wager contract, and void as against public policy. Having obtained valid insurance if the interest of the policyholder ceases in the property covered, the policy at once becomes inoperative. There is then no possibility of a loss, consequently no basis for indemnity. The contract being one of indemnity and personal to the insured, it follows that any assignment by him with a transfer of the title to the property transfers no right in the insurance to the assignee, without the consent of the insurer."

This is only one expression of many to the same effect to be found in the authorities.

We agree with counsel that there must be a transfer or assignment of the interest of the insured to the purchaser with the consent of the insurer, thus creating a new contract; and, in addition, where the policy so provides, the consent to the transfer must be in writing endorsed on the policy.

It may be admitted, too, that it has been decided that an assignment proper is a transfer by writing, yet, a transfer need not be in writing. In the absence of a formal transfer in writing which is not necessary, there are many other facts and circumstances which courts will recognize as an assignment. "Delivery is not essential." 2 May on Ins. (3d ed.), 394 and 395.

It must, however, be conceded that stipulations as to the manner in which the consent may be given can be waived, either expressly or by implication. In *Moffitt v. Phenix Ins. Co.*, 11 Ind. App. 233, it is so held.

In *Burnham, etc., Co. v. Insurance Co.*, 63 Mo. App. 85, the court says: "Notwithstanding there is serious conflict in the decided cases, a large preponderance of authority will be found in favor of the proposition that, even though the policy may require the assent to further insurance, to be evidenced by writing, and though there shall be further provision that such a condition shall only be waived in writing, or indorsed on the policy, yet such conditions can be dispensed with by the company, or its agents by oral consent, as well as by such writing indorsed on the policy."

There is not, in words, a direct averment in the complaint that the policy was assigned by Sanders to Robison, but it is averred that the defendant was notified of the sale and conveyance of the property insured, and that it consented to and agreed that said policy should become payable to Robison in case of loss while he was the owner thereof; that it agreed to endorse the fact of said transfer to the person to whom the same had become payable in writing upon said policy, but that it neglected and failed to do so; that it waived the endorsement of the same in writing; that the failure to have said endorsement on the policy was not the fault of the plaintiff or Robison, but wholly the fault of the defendant; that the company then and there informed plaintiff and Robinson that it would waive the endorsement on said policy and that it should be valid and payable to Robinson.

The averment that these conditions were waived (not as under some circumstances they may be by silence) is that they were waived by the defendant

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company so that the power of an agent, or any particular officer, is not in question.

From these averments, from the fact that plaintiff notified the defendant of the transfer, that thereupon appellant agreed with plaintiff and Robinson to pay any loss to the grantee that might occur while he owned the property, there can be but the one reasonable inference, viz.: that the transfer of the policy entered into the conveyance of the real estate. These averments are sufficient, in our opinion, to show, as between the parties to this action, an equitable assignment of the policy by appellee to Robison and the making of a new contract between the insurance company and Robison.

"It is well settled that a contract of insurance may be made and assigned in parol." *Moffitt v. Phenix Ins. Co.*, 11 Ind. App. 237; *Com., etc., Assur. Co. v. State, ex rel.*, 113 Ind. 331.

It is further averred in the complaint, that at the time of said conveyance the premium note on said insurance policy was due the defendant, and that after said conveyance had been made, with the full knowledge of the same, the defendant collected said note from the plaintiff.

Under the policy, the insurance was to continue for three years, from the 7th of October, 1891, to the 7th of October, 1894, and, for the purposes of this demurrer, it is admitted that the defendant received the premium for the unearned insurance on the policy which, by its terms, it had the right to cancel on notice to that effect, and refunding, or offering to refund, a ratable proportion of the premium for the unexpired term. The appellee was the owner of the property at the time it was insured. Robinson, grantee, was the owner when it was destroyed by fire. At said respective dates each had an insurable in-

terest. The appellant, with knowledge that the title in the property had passed to Robinson, received the premium for unearned insurance and agreed to pay him any loss that might occur by fire while he was owner.

A full and complete consideration for the protection from fire had been paid for a definite term of years, the loss having occurred within that period, every presumption will be indulged that the insurer intended, in accepting its premium, to assume the burden of indemnity.

Appellee claims that the evidence is not properly in the record. An examination of the record discloses the fact that material evidence introduced by the appellee is not in the record. In view of this fact, the statement in the bill of exceptions, that "This was all the evidence given in said cause," will not prevail, and questions arising upon the evidence will not be considered. *Board, etc., v. Wagner, Admr.*, 138 Ind. 609.

This is not to be announced as a universal rule, because there are many cases when it would be useless to set forth the entire evidence. All that is needed to fully inform the court of the character of the ruling is the record of the issues and the statement of the evidence offered, and a description of the time and manner in which the offer was made. *Johnson v. Wilcy*, 74 Ind. 233.

But for another reason than the omission of the material evidence, under numerous decisions of the Supreme Court of this State, the evidence is not properly in the record. The evidence was taken in shorthand, and it is sought to certify the longhand manuscript of the evidence to the court under section 1 of an act approved March 7, 1873 (Acts 1873, p. 194). It is the law of this State that under said act the longhand copy of the evidence must be filed in the clerk's

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office before it is embodied in the bill of exceptions and signed by the judge, and this fact must be affirmatively shown by the record.

It appears, in this cause, that the longhand copy of the evidence and the bill of exceptions were filed in the clerk's office at the same time. We cite from *Joseph v. Wild*, 146 Ind. 249, the following, which is in point and which refers to a number of comparatively recent decisions in this State:

"We cannot consider any question raised by the motion for a new trial for the reason that the evidence is not properly in the record.

"The evidence in the cause was taken down by a shorthand reporter, and it is sought to certify the longhand manuscript of the evidence to this court under section 1 of an act approved March 7, 1873 (Acts 1873, p. 194). The record shows that the bill of exceptions was signed by the trial judge on October 23, 1895, and the record does not show that the longhand copy of the evidence was filed in the clerk's office before the bill of exceptions containing the same was signed by the judge.

"It is settled law in this State that under said act of 1873 the longhand copy of the evidence must be filed in the clerk's office before it is embodied in the bill of exceptions and signed by the judge, and this fact must be affirmatively shown by the record. *Carlson v. State*, 145 Ind. 650; *Rogers v. Eich*, 146 Ind. 235; *Manley v. Felty*, 146 Ind. 194; *DeHart v. Board, etc.*, 143 Ind. 363; *Smith v. State*, 145 Ind. 176; *Beatty v. Miller*, 146 Ind. 231; *Hamrick v. Loring* (Ind. Sup.), 45 N. E. 107."

There are other objections made by appellee to the record, but in view of the conclusion reached, it is not necessary to pass upon them.

Judgment affirmed.

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[No. 1,723. Filed March 9, 1897.]

APPEAL AND ERROR.—*Review of Evidence on Appeal.*—This court will not weigh the evidence ; it is sufficient to sustain the verdict if there was some evidence produced tending to prove every substantive fact found. *p. 148.*

SPECIAL VERDICT.—*Payment.*—*Finding Of is an Ultimate Fact.*—A special verdict, in an action on a promissory note, wherein the jury found that the note in suit was fully paid and satisfied before the commencement of the action is the finding of an ultimate fact and not a conclusion of law. *pp. 148, 149.*

BILLS AND NOTES.—*Payment.*—*Note Given in Payment of Debt.*—The acceptance by a creditor of the note of a third person in full satisfaction of an existing debt is an extinguishment of the original indebtedness although the note is taken for a less sum than the whole debt. *p. 150.*

SAME.—*Payment.*—*Note Given in Payment of Debt.*—*Burden of Proof.*—To establish the defense of payment of a preexisting debt by the note of a third person, it is necessary for the defendant to prove that the note was given to the creditor and received by him upon the express agreement that it should be in satisfaction of the previous debt, and the burden of proof is upon the defendant setting up such defense. *p. 150.*

PAYMENT.—*How Applied to Different Existing Obligations.*—The law applies a payment first to a debt with the least security, unless there be peculiar equities calling for a different appropriation, but the law will not sanction the application of a payment made by a third person, at the instance of and for the benefit of another, to an obligation upon which neither such third person nor the debtor for whose benefit the payment was made was liable. *pp. 150, 151.*

SAME.—*Refusal of Creditor to Apply Payment as Directed by Debtor.*—Where the creditor refuses to apply the payment as directed by the debtor but accepts the payment so made, he must apply such payment as directed. *p. 151.*

PRINCIPAL AND SURETY.—*Bills and Notes.*—Where a note has been executed by the principal, a party signing it as surety, at a time subsequent to the incurring of the original obligation, without any new or distinct consideration passing therefrom, is not liable. *p. 152.*

From the Carroll Circuit Court. *Affirmed.*

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McConnell & Jenkins, L. B. Sims and Pollard & Pollard, for appellant.

John H. Gould and Nelson & Myers, for appellee.

HENLEY, J.—The appellant, the payee of the promissory note upon which this action was begun, filed his complaint in the lower court against appellee, who was the alleged surety upon the said note.

The complaint in this cause avers that the note in suit was executed by Hugh Hardy, as principal, and David J. Hardy, as surety; that Hugh Hardy, the principal, died before this action was begun; that at the time of his death he was wholly and totally insolvent and left no property or estate, and that long before the death of said Hugh Hardy he was openly and notoriously insolvent, and this action is prosecuted against David J. Hardy, the surety, alone.

The first paragraph of appellee's answer is a general denial.

The second is a plea of payment.

The third alleges a total want of consideration.

The fourth admits the execution of the note, and says that appellee executed the same as surety for Hugh Hardy, now deceased, but he alleges an agreement in substance as follows: That before the commencement of this suit, he, the appellant, procured one David H. Hardy to execute his, David H. Hardy's two promissory notes to the appellant, Henry Wipperman, which said promissory notes were by the appellant accepted in full payment of the note in suit, and other notes on which appellee was surety for Hugh Hardy; that instead of delivering up the note so paid him, the appellant retained the same without the knowledge or consent of the appellee, and another note of the said Hugh Hardy on which this appellee was not surety was given up by the appellant to said

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David H. Hardy, and the one in suit was retained by the appellant; that said paragraph of answer stated the agreement in another form as follows: That the agreement between the appellant and the appellee was, that if appellee would procure David H. Hardy to execute his two certain promissory notes for an amount equal to the amount due upon the notes on which he was security for Hugh Hardy, that appellant would accept them in payment and discharge of this note in suit, together with the other note that appellant, Wipperman, then held against him. That he did procure David H. Hardy to execute his two certain promissory notes to the appellant for the full amount that the appellee was indebted to him as surety for Hugh Hardy; but that appellant, Wipperman, neglected and refused to surrender the note in suit, but retains the same, and also retains the notes executed to him by said David H. Hardy, and upon these facts appellee claims the appellant should not recover in this suit.

The substance of the fifth paragraph of appellee's answer is, that on and prior to the 30th day of April, 1892, appellee was indebted to appellant in the sum of \$1,500.00 and accrued interest thereon, which said indebtedness was evidenced by two promissory notes, executed by said Hugh Hardy as principal, and appellee as surety; one dated November 3, 1877, for \$1,000.00, and the other dated December 10, 1877, for \$500.00; that said notes remain unpaid, except the interest due thereon to December 17, 1885; that prior to April 30, 1892, appellee entered into a contract with appellant, that if appellee would procure one David H. Hardy to execute to appellant his two certain promissory notes for the amount due upon the aforesaid notes, executed by Hugh Hardy as principal and appellee as his surety, the appellant, Wipperman,

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would accept the same, and release the appellee from all liability on said notes; that, pursuant to said agreement, said David H. Hardy executed his two promissory notes to appellee for the full amount due upon said notes then held by Wipperman against Hugh Hardy and this defendant; and that said Wipperman accepted said notes, but neglected to deliver to said David H. Hardy both of the notes on which appellee was surety, but retained, in violation of said contract, the note now in suit.

The sixth paragraph of answer alleges substantially, that the appellant, Wipperman, prior to April 30, 1892, held the two notes described in the fifth paragraph of answer, *supra*, executed by Hugh Hardy, and on which appellee had written his name as surety; that prior to said date a controversy arose between the appellant and appellee as to whether appellee was liable on said notes as surety for Hugh Hardy; that to save litigation and to secure his release from liability upon said notes, if any there was, it was agreed between appellant and appellee that if appellee would procure David H. Hardy, the son of Hugh Hardy, to execute his promissory notes for the amount due upon said notes of Hugh Hardy, and appellee, given to appellant in 1877, that appellant would accept the same and release appellee from all liability upon said notes. That in accordance with the terms of said agreement the appellee procured David H. Hardy to execute to the appellant his two certain promissory notes for the full amount due upon the aforesaid Hugh Hardy notes.

To these several answers the appellant filed two paragraphs of reply. The first one being a general denial, and to the second a demurrer was filed and sustained by the court.

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The cause being at issue, was submitted to a jury and a special verdict returned. The verdict finds, in substance, the following facts:

First. That on the 23d day of November, 1877, one Hugh Hardy borrowed and received from appellant \$1,000.00, and in consideration therefor, on the same day, the said Hugh Hardy executed and delivered to appellant his promissory note therefor, but that at said time the name of appellee was not on said note.

Second. That on the 10th day of December, 1877, Hugh Hardy borrowed and received from the appellant \$500.00, and in consideration therefor, on the same day, executed and delivered to appellant his promissory note, but at the time said note was so executed by Hugh Hardy the name of appellee was not on said note.

Third. That no part of the consideration of either of said notes ever passed to the benefit of appellee.

Fourth. That appellee never received from any one any part of the proceeds of either of said notes.

Fifth. That in January, 1878, while appellee was at the home of appellant, at the request of appellant, appellee signed his name to both of the above described notes.

Sixth. That no consideration passed from appellant to appellee, nor to said Hugh Hardy [the principal], for the signing of said notes, or either of them, by appellee.

Seventh. That said Hugh Hardy never at any time requested appellee to sign either of said notes.

Eighth. That appellee never promised or agreed with Hugh Hardy at any time to sign either of said notes.

Tenth. That at the time said Hugh Hardy signed

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said notes he was worth, in real and personal property, the sum of \$18,000.00.

Eleventh. That prior to April 30, 1892, a controversy arose between the appellant and appellee as to whether or not appellee was liable upon said notes. That appellant was at the time threatening to bring suit on said notes, which included the one in controversy. That appellant and appellee, for the purpose of avoiding litigation, agreed that if appellee would procure one David H. Hardy [who was a son of Hugh Hardy, the principal on said notes] to sign and deliver his two notes, aggregating the sum of \$2,334.32, to appellant, he, appellant, would accept said notes of David H. Hardy and release appellee from any and all liability, real or pretended, by reason of appellee's signing said notes. That appellee did, on and prior to April 30, 1892, induce and procure said David H. Hardy to sign and deliver to the appellant his two promissory notes for the aggregate sum of \$2,334.32, but appellant retained in his possession the note in suit.

Twelfth. That on the 29th day of December, 1885, Hugh Hardy [who was the principal on the note in suit] had executed to appellant his certain note for \$563.00, which was signed by said Hugh Hardy alone. That appellant had said last mentioned note with him at the office of his attorney, on the 30th day of April, 1892, and delivered the same to David H. Hardy, instead of the note in suit, which appellant retained without the knowledge or consent of the appellee.

Thirteenth and Fourteenth. That the following endorsement appears on the note in suit, purporting to have been made April 20, 1892: "This note is paid, except the sum of \$520.62, which is yet due and unpaid, which is to bear six per cent. interest from this date." That said endorsement was made by appel-

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lant's attorney; that appellee did not know of such endorsement until shortly before the commencement of this action, and never agreed to or ratified the same.

Fifteenth. That when David H. Hardy executed and delivered to appellant, on the 30th of April, 1892, his two notes for \$2,334.32 the appellant surrendered to said David H. Hardy the \$1,000.00 note, which appellee had signed, and the \$563.00 note, which was signed by Hugh Hardy alone. That appellee believed at the time that appellant had surrendered to David H. Hardy both the notes to which appellee's name was attached.

Sixteenth. That the note in suit was paid and satisfied before the commencement of this action.

Upon the verdict, the court rendered judgment in favor of appellee, defendant, in the lower court.

The evidence upon a great many of the material facts found in the verdict is conflicting and unsatisfactory; but it is not the province of this court to weigh the evidence. It is sufficient to sustain the verdict if there was some evidence produced tending to prove every substantive fact found. There was evidence introduced upon the trial of this cause supporting every fact found by the jury.

Counsel for appellant contend that the second paragraph of appellee's answer, which is a plea of payment, is unsupported by the evidence, and that the finding of the jury, numbered sixteen in the special verdict, wherein the jury found that the note in suit was fully paid and satisfied before the beginning of this action, is a finding of a conclusion of law. In examining a special verdict, we recognize it as the settled rule that the special verdict, reasonably and fairly construed, must disclose all the facts essential to sustain the judgment, either by direct finding, or necessary inference. We are not convinced by the able

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argument of counsel for appellant that the finding of the jury that the note in suit was fully paid and satisfied before the commencement of this action, is a conclusion of law; but the court holds such finding to be the finding of an ultimate fact, and we are not alone in the opinion, being supported by no less authority than the Supreme Court of this State. In the case of *Braden, Admr., v. Lemmon*, 127 Ind. 9, the Supreme Court says: "The real controversy between the parties relates to the effect of the special finding above referred to, the appellant contending that payment is an ultimate fact to be found by the court, while it is contended by the appellees that payment is a conclusion of law to be deduced from a given state of facts.

"Mr. Thompson, in his work on Trials, vol. 1, section 1253, says: 'There is no rule of law as to what is or as to what is not payment. Payment is simply the doing of what a man has agreed to do. It is, therefore, a pure question of fact; and where a man has agreed to pay, and tenders what he understands to be a performance of his agreement, and the other party accepts, it is a naked question of fact and intent whether it was accepted as performance. In every such case the ultimate point of inquiry does not touch a rule of law, but stops at a conclusion of fact.' As applied to this case we fully concur in what Mr. Thompson says upon this subject. Payment is a question of fact, and not one of law."

In the case above cited, the lower court made a special finding of facts, in which was found evidential facts strongly tending to establish payment, but it wholly failed to find the ultimate fact of payment, and payment was by the court stated as a conclusion of law. For the absence from the finding of facts of a direct finding of the ultimate fact of payment the cause was reversed.

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In the cause before us, the jury found the ultimate fact of payment, and in addition thereto evidential facts sufficient to prove payment.

The law is well settled, that the acceptance by a creditor of the note of a third person, in full satisfaction of an existing debt, is an extinguishment of the original indebtedness, and this is true, although the note is taken for a less sum than the whole debt. *La-boyteaux v. Swigart*, 103 Ind. 596; *Conkling v. King*, 10 N. Y. 440; *Maxwell v. Day*, 45 Ind. 509.

To establish the defense of payment of a preexisting debt by the note of a third person, it is necessary for the defendant to prove that the note was given to the creditor and received by him upon the express agreement that it should be in satisfaction of the previous debt, and the burden of proof is upon the defendant setting up such defense.

It was for the jury to say whether the notes were accepted in satisfaction of the debt in suit, and having so found, the court will not disturb such finding upon the mere weight of the testimony. *Gardner v. Gorham*, 1 Doug. (Mich.) 507; *Bonnell v. Chamberlin*, 26 Conn. 487; *Seltzer v. Coleman*, 32 Pa. St. 493.

In this case, the appellant is, in effect, contending that he had a right to apply the note of David H. Hardy to the payment and satisfaction of a note upon which appellee's name did not appear, and to a note upon which the appellee's name did appear as a maker. If this arrangement by which the appellant secured the two notes of David H. Hardy was brought about by the agreement of appellant and appellee, as found by the jury, appellee had a right to say to appellant, if he accepted said notes of David H. Hardy under said agreement, just what debts should be satisfied thereby.

The law applies a payment first to a debt with the

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least security, unless there be peculiar equities calling for a different appropriation, but the law would certainly not sanction the application of a payment made by a third person, at the instance of and for the benefit of another, to an obligation upon which neither the person nor the debtor for whose benefit the arrangement had been made was liable.

It is also one of the settled rules governing the application of payments that if the matter of the application of the payment is canvassed between the debtor and creditor, and the creditor *refuses to apply the payment as directed by the debtor, but accepts the payment so made*, he must apply it as directed by the debtor.

Under the second paragraph of answer upon the verdict as returned by the jury, the lower court would have erred had it refused to render judgment in favor of appellee.

- Counsel for appellee, after discussing the verdict as it applies to the third paragraph of answer, say: "For the purpose of peace and harmony his humble counsel will admit that the finding does not establish the third paragraph of the answer, but the appellant is not injured by it, as the judgment rests upon other and solid grounds."

We cannot hold the statement of appellee's counsel, in regard to the verdict as it affects the third paragraph of appellee's answer, as a confession of error. If it was so intended by counsel they would not be here contending that the judgment be affirmed. Under such circumstances the verdict must speak for itself, and if it did in fact sustain the third paragraph of answer, the judgment, in the absence of reversible error, would be affirmed. A very careful examination of the authorities, and of the verdict as applicable to the third paragraph of appellee's answer, convinces us, assuming that there was evidence to sustain the

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finding of the jury, that the lower court would have erred in refusing to find for appellee on the third paragraph of his answer.

We think the facts found, applicable to this paragraph of answer, bring the case squarely within the doctrine announced by this court in the case of *Brant v. Barnett*, 10 Ind. App. 653, and *Owens v. Tague*, 3 Ind. App. 245, and cases therein cited, wherein the court held, that where a note has been executed by the principal, a party signing it as surety, at a time subsequent to the incurring of the original obligation, without any new or distinct consideration passing therefor, is not liable.

The defendant having established the second paragraph of his answer, that was sufficient upon which to maintain the judgment herein, and it is unnecessary for us to further examine the verdict as supporting other defenses.

We find no error in the record for which the cause should be reversed.

Judgment affirmed.

AXTELL ET AL. *v.* WORKMAN.

[No. 2,122. Filed March 9, 1897.]

APPEAL AND ERROR.—*Assignment of Errors.*—*Complaint.*—An assignment of the insufficiency of the complaint as error is unavailing if one paragraph of the complaint is sufficient. *p. 153.*

PROCESS.—*Service of Summons.*—*Indorsement on Complaint.*—*Statute Construed.*—Where plaintiff's indorsement on his complaint, as provided by section 524, Burns' R. S. 1894, fixing the day on which defendant shall be summoned to appear, is so defective as not to be within the permission given by the statute, yet the clerk accepts it as a sufficient indorsement, and acts upon it as such in the issuing of the summons, the action will be deemed to have commenced. *pp. 154-161.*

From the Greene Circuit Court. *Affirmed.*

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Seymour Riddle, for appellants.

W. F. Gallemore, for appellee.

BLACK, J.—Counsel for appellants have argued two alleged errors specified in the assignment,—that the complaint does not state facts sufficient to constitute a cause of action, and that the court erred in overruling the motion of the appellants to set aside the summons and the service thereof.

The action was upon a promissory note assigned by indorsement in writing by the payee to the appellee. The complaint consists of two paragraphs, without any apparent reason for more than one.

A copy of the note with a copy of the assignment was inserted between these paragraphs and was referred to in each as being filed therewith, and made part thereof. In the first paragraph this exhibit was designated as "Exhibit No. 1;" in the second paragraph it was designated as "Exhibit A."

In the brief for the appellants it is said that the exhibit was not marked either as "Exhibit No. 1," or as "Exhibit A," but this statement is not confirmed by the record, in which the exhibit is marked at the head thereof, "Exhibit A."

Upon the assumption that the exhibit was merely filed, and was not marked as an exhibit, counsel contends that the effect is the same as if there were no copy in the record; and upon such ground alone the sufficiency of the complaint is questioned for the first time in this court.

An assignment of insufficiency of the complaint as error is unavailing if one paragraph of the complaint is sufficient.

It being unnecessary to decide more than is presented for decision, it is enough to say that the exhibit

was marked as indicated in one paragraph of the complaint.

The complaint was filed on the 11th day of May, 1895, in term time, bearing an indorsement signed by the plaintiff's attorney as follows: "Clerk will set this cause of action down for answer and trial on the 26th judicial day of the present April term of this court, the same being the 21st day of May, 1895."

The summons was issued and served on the day on which the complaint was filed, and by it the defendants were commanded to appear on the 21st of May, 1895.

On the 22d of May, 1895, the twenty-seventh judicial day of said term, the appellants entered a special appearance and moved to set aside the summons and the service thereof. This motion was based solely upon grounds which questioned the sufficiency of the indorsement, above set out, upon the complaint.

The motion was overruled and afterward judgment was rendered against the appellants on default.

The statute, section 316, Burns' R. S. 1894 (314, Horner's R. S. 1896), provides, that "a civil action shall be commenced, by filing in the office of the clerk a complaint, and causing a summons to issue thereon; and the action shall be deemed to be commenced from the time of issuing the summons." It is also provided, section 319, Burns' R. S. 1894 (317, Horner's R. S. 1896), that "no summons, or the service thereof, shall be set aside, or be adjudged insufficient, where there is sufficient substance about either to inform the party on whom it may be served, that there is an action instituted against him in court, the name of the plaintiff and the court, and the time when he is required to appear."

In relation to the time when actions shall stand for issue and trial, the statute, section 524, Burns' R. S.

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1894 (516, Horner's R. S. 1896), provides: "Every action shall stand for issue and trial at the first term after it is commenced, when the summons has been served on the defendant ten days, * * * before the first day of the term: *Provided, however,* that when a complaint is filed, whether before or during any term of court, the plaintiff may fix the day during such term by endorsement thereof upon the complaint at the time of filing the same, on which the defendant shall appear, which day, when so fixed, shall be stated in the summons when issued. * * * And if summons shall be personally served ten days before such day, * * * such action shall thereupon stand for issue and trial at such term, and the court shall have jurisdiction to hear and determine such action as if summons had been served * * * before the first day of the term as herein provided; and if at any time after the filing of the complaint it shall be found that any party to the action has not been properly notified, the plaintiff may file with the clerk or indorse on the complaint a written request for such notice to be given, naming therein the day of the pending or subsequent term on which such party is required to appear to the action, and summons shall be issued * * * accordingly, in the proper case as above provided," etc.

Besides filing his complaint, the plaintiff must also cause summons to issue, before the action will be deemed commenced.

The action will stand for issue and trial at the first term after the filing of the complaint and the issuing of summons, when the summons has been served ten days before the first day of that term. But the plaintiff may cause it to stand for issue and trial at a pending term, or he may cause it to so stand at the next term without service ten days before its first day,

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if when he asks for summons he, by indorsement upon the complaint at the time of filing it, shall have fixed the day during such pending or next term on which the defendant shall appear, and if this day so fixed shall have been stated in the summons when issued and if the summons shall have been personally served ten days before such day.

It is insisted by counsel for appellants that the indorsement upon the complaint was not in conformity with the statute, for the reason that "nothing is mentioned in said indorsement as to a day fixed nor as to a time for the defendants to appear."

The question presented to us did not arise upon an application to be relieved from a judgment upon default, nor did it originate in a refusal of the clerk to state in the summons, when issued, as the day for the defendant to appear, the same day that was designated in the indorsement. The clerk treated the indorsement as sufficiently fixing a day for appearance and issued a summons in which the defendant was commanded to appear on that day.

The statute does not prescribe any particular form of indorsement. It is sufficient if it can properly be construed as a direction to the clerk to state in the summons a particular appearance day in the pending term or the first term after the filing of the complaint. If the summons be not personally served ten days before such day, the cause would not stand for issue and trial at the term in which a day was so fixed.

The indorsement on the complaint in this cause was elaborate but not in good form, yet the clerk took it as a direction to state in the summons the day mentioned in the indorsement, and, in issuing the summons, stated that day therein as the day on which the defendants should appear. The summons was served ten days before the day so designated in the

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indorsement and in the summons. If the indorsement can properly be regarded as so far a failure to conform to the provision of the statute that the clerk might rightfully have ignored it, it may well be doubted whether the substantial rights of the appellants were affected by the action taken upon the indorsement.

In *Briggs v. Sneghan*, 45 Ind. 14, the court said: "If the summons has been served ten days before the first day of the term, the case stands for issue and trial. If the summons has been served, but not ten days before the first day of the term, the cause will be continued until the next term. In such case no new process or service thereof is required."

Where an indorsement upon a complaint directed the clerk to issue summons returnable on a day in vacation, and the summons was made returnable on the day so indicated, and it was served more than ten days prior to said day, and a motion, made upon special appearance, to set aside the summons and the service thereof, because the return day named in the summons was in vacation, was overruled, the court on appeal, quoting the statutory provision, that "no summons or the service thereof shall be set aside, or be adjudged insufficient, where there is sufficient substance about either to inform the party on whom it may be served, that there is an action instituted against him in court," said: "The summons in this case was evidently sufficient to inform the appellant that an action had been instituted against him in the court below by the appellee. Being to that extent sufficient, the section of the code, above set out, fully sustained the court in refusing to set both it, and the service of it, aside, on account of the irregularity in the day of its return." *Ross v. Glass*, 70 Ind. 391.

Eastes v. Eastes, 79 Ind. 363, was a suit for divorce.

Axtell et al. v. Workman.

At the time of its institution the statutory provision above mentioned, relating to the fixing of a day for the appearance of the defendant by indorsement on the complaint, did not extend to suits for divorce. The complaint for divorce was filed during the September term, 1879. There was an indorsement upon it directing the clerk to issue summons returnable on the 24th of October, 1879. There was no appearance until the January term, 1880. In that term the defendant entered a special appearance and moved to quash the summons. This motion was overruled.

The Supreme Court, having referred to the provision of the statute regulating divorces, that "the cause shall stand for issue and trial at the first term of the court after the summons has been personally served upon the defendant ten days, or publication has been had for thirty days, before the first day of such term," 2 R. S. 1876, p. 329; section 1049, Burns' R. S. 1894 (1037, R. S. 1881), said: "But we do not agree with appellant's counsel in his conclusion, that, because the summons in this case was issued in term time and made returnable to a future day in the same term, it was therefore inoperative and wholly void. *

* * It has always been the law, in a free country, that the courts were open at all times for the institution of suits, as well in term time as in vacation; and where, as in this case, the suit was commenced in term time, the process issued would be made returnable at that term, unless otherwise ordered. In such cases, if the process were served either before or after the close of the term, the effect of such service would be the same, namely, the continuance of the cause, by operation of law, until the next succeeding term of the court. * * * The summons and the service thereof, as it seems to us, were sufficient notice to the appellant, under the law, of the pendency of the ap-

pellee's suit for the January term, 1880, of the circuit court."

This statute providing for an indorsement upon the complaint of a fixed day for the defendant to appear is a statute relating to the time when an action shall stand for issue and trial. If the indorsement be defective, but the clerk, when he issues the summons, accept the indorsement as a sufficient direction to him to state in the summons the day mentioned in the indorsement, and state it accordingly in the summons as the day on which the defendant shall appear, and return be made by the proper officer showing personal service of the summons on the defendant by such officer, and there be no objection to the form of the summons on the return, or to the manner of the service, but objection be made only to the form of the indorsement on the complaint, can it be regarded as the purpose of the statute relating to such indorsement, or can it be considered as conducive to the proper administration of justice, to set aside the summons and the service thereof? If, in such case, the summons can be held to have been issued and served for a day at which the defendant cannot be required to appear, and when a judgment by default could not, therefore, be properly taken against him, what just and useful purpose could be subserved by requiring a new summons and the service thereof?

For the procurement of a summons at the time of the filing of the complaint a written request or precept for a summons is not necessary, but the direction to issue summons may be oral. This is true whether or not there be an indorsement on the complaint as contemplated by the statute under consideration relating to such indorsement. The statute provides that when the complaint is filed the plaintiff may fix the day by indorsement thereof upon the complaint, on

which the defendant shall appear, which day, when so fixed, shall be stated in the summons when issued.

It is a provision for the benefit of plaintiffs,—not to enable a plaintiff to procure a summons, but to enable him in procuring it to cause to be stated therein a day fixed by himself, instead of the time which otherwise would be fixed by the law, for the defendant to appear.

Suppose that, notwithstanding the service of the summons in this case, the appellants had wholly failed to appear until the next term of the court, at the time at which they could have been commanded to appear in a summons issued without any indorsement on the complaint, and that in the meantime there had been no proceedings had in the cause, would it be thought to be proper to quash the writ and the return?

If the indorsement should be regarded as so defective as to be not merely insufficient to require the clerk to state in the summons the day mentioned in the indorsement, but equivalent to no indorsement of any kind, then, as in *Eastes v. Eastes, supra*, where the indorsement on the complaint for a divorce was not provided for by statute, would not the service of the summons be good for the next term? And would not a motion made by the defendant at the next term to quash the summons and return be overruled? And if the summons and service would be good for the next term, the action would have to be regarded as commenced when the complaint had been filed and the summons had been issued; and if the action was properly commenced, and the defendants had been summoned for too early a day, the law would continue the cause to the next term, and the motion to set aside the summons and service could not be sustained at any time. The plaintiff would merely have failed to

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exercise, effectively, his privilege to fix a day for the defendant to appear.

We are of the opinion that if the indorsement on the complaint can be regarded as so defective as not to be within the permission given by the statute, yet the clerk having accepted it as a sufficient indorsement and having acted upon it as such, in the issuing of the summons, there was the commencement of an action, and whether the cause should have been continued to the next term or not, the court did not err in overruling the motion to set aside the summons and service.

The judgment is affirmed.

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[No. 2,336. Filed March 9, 1897.]

CRIMINAL LAW.—Affidavit.—Duplicity.—Motion to Quash.—When duplicity in an affidavit clearly exists, it is sufficient ground for sustaining a motion to quash. *pp. 163, 164.*

SAME.—Affidavit.—Duplicity.—Before an affidavit can be held bad for duplicity there must be a joinder of two or more separate and distinct offenses in one and the same count. *p. 164.*

SAME.—Intoxicating Liquors.—Affidavit.—Duplicity.—An affidavit charging a violation of section 4, Act of March 11, 1895, prohibiting, during such days and hours when the sales of intoxicating liquors are unlawful, the maintaining of screens obstructing the view of a room in which such liquors are sold, is not bad for duplicity because it contains some, though not all, of the averments necessary to charge an offense under another and different statute. *pp. 162–164.*

SAME.—Trial Not Concluded Until Judgment is Rendered.—In a criminal cause the trial is not concluded until judgment is rendered; and until that time the power of the court to extend the time of making out and presenting a bill of exceptions is not exhausted. *p. 165.*

APPEAL AND ERROR.—Bill of Exceptions.—Request for Written Instructions.—When the trial judge says in the bill of exceptions that he was required by defendant to give the jury instructions in writing, and the bill shows that he did instruct in writing, and that

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after the giving of written instructions he gave the defendant an exception to the giving of an oral instruction, the record sufficiently shows that the request for written instructions was properly made. pp. 166, 167.

INSTRUCTIONS.—*Direction as to Form of Verdict not an Instruction.—Statute Construed.*—Where the jury had already been instructed as to the punishment they might inflict if they found the defendant guilty, an instruction setting out the forms of verdict that might be returned, is not an instruction within the meaning of section 1892, Burns' R. S. 1894, subd. 5, requiring the court to instruct the jury in writing upon request made at any time before the commencement of the argument. pp. 168-170.

From the Montgomery Circuit Court. *Affirmed.*

James Wright and James M. Seller, for appellant.

W. A. Ketcham, Attorney-General, *Merrill Moores and Dumont Kennedy*, for State.

ROBINSON, J.—This cause was transferred to this court by the Supreme Court.

The appellant was charged with violating the provisions of section 4, of the Act of March 11, 1895 (Acts 1895, section 4, p. 250). A motion to quash the affidavit was overruled. A trial by jury resulted in a verdict of guilty as charged. Over a motion in arrest of judgment and a motion for a new trial, the court rendered judgment on the verdict.

The errors assigned by appellant and argued by his counsel in their brief are the overruling of his motion to quash the affidavit, and his motion for a new trial.

Counsel for the appellant insist that the affidavit is bad for duplicity. Omitting the formal parts, the affidavit reads as follows: "William Royer, of lawful age, being duly sworn upon oath says, he is informed and believes that at and in the county of Montgomery, and State of Indiana, on the 4th day of July, 1895, one Thomas Herron did then and there unlawfully erect, caused to be erected, and kept in position certain screens, blinds, and obstructions, which said blinds, screens, and obstructions were placed by said Thomas

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Herron in a certain building and room kept, operated, and controlled by the said Thomas Herron, in which said room intoxicating liquors were sold on July 4, 1895, and are sold by virtue of a license issued under the laws of the State of Indiana, in less quantities than a quart at a time, to be drunk on said premises and in said room, that sales of intoxicating liquor are forbidden by the laws of the State of Indiana on said 4th day of July, and that said curtains, blinds and screens did then and there obstruct the entire view of said room so kept by the said Thomas Herron, from the highway upon which said room is situated and from the people who passed upon said highway in front of and by said room so kept by the said Thomas Herron, contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Indiana.”

The statute under which the affidavit is filed is as follows: “Any room where intoxicating liquors are sold by virtue of a license issued under the law of the State of Indiana, for the sale of spirituous, vinous, malt or other intoxicating liquors in less quantities than a quart at a time, with permission to drink the same upon the premises, shall be situated upon the ground floor or basement of the building where the same are sold, and in a room fronting the street or highway upon which such building is situated, and said room shall be so arranged, either with window or glass door, as that the whole of said room may be in view from the street or highway, and no blinds, screens or obstructions to the view shall be arranged, erected, or placed so as to prevent the entire view of said room from the street or highway upon which the same is situated during such days and hours when the sales of such liquors are prohibited by law. * * *”

It is well settled in this State that when duplicity

clearly exists it is sufficient ground for sustaining a motion to quash. *Davis v. State*, 100 Ind. 154; *Joslyn v. State*, 128 Ind. 160; *Knopf v. State*, 84 Ind. 316; *Fahnestock v. State*, 102 Ind. 156.

Before an affidavit can be held bad for duplicity there must be a joinder of two or more separate and distinct offenses in one and the same count. *McCollough v. State*, 132 Ind. 427; *Kiley v. State*, 120 Ind. 65; *State v. Weil*, 89 Ind. 286.

Is the charge in the affidavit sufficient to sustain a conviction either under the statute above set out, or for a sale of intoxicating liquors on the fourth day of July? It does charge a violation of the provisions of the above statute. Does it charge an unlawful sale on the day named? Without attempting to set out all the necessary averments in an affidavit charging such unlawful sale, it is sufficient to say that this affidavit does not state to whom a sale was made, nor does it state that on that day a sale of intoxicating liquors was made, to be drunk as a beverage. *Dowdell v. State*, 58 Ind. 333; *Allman v. State*, 69 Ind. 387; *Morel v. State*, 89 Ind. 275.

The affidavit may contain averments not absolutely necessary, but it cannot be held bad for duplicity because it contains a part only of the averments necessary to charge an offense under another and different statute. We do not think the affidavit charges the appellant with having committed two different offenses, defined in two different sections of the statutes. The motion to quash was properly overruled.

It is urged by the State that the questions raised by the motion for a new trial are not properly in the record.

On the 14th day of September, 1895, a jury was impaneled to try the appellant, and on the same day returned a verdict of guilty. On the 8th day of October,

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1895, during the term at which the verdict was rendered, the appellant filed a motion for a new trial. At the same term, on the 21st day of October, 1895, the motion for a new trial was overruled, to which appellant excepted, and thirty days' time was given within which to prepare and file a bill of exceptions. No bill was filed within the time thus allowed. On the date last named the appellant filed his motion in arrest of judgment. At the next succeeding term of court, on the 6th day of November, 1895, the motion in arrest was overruled and exception taken, and thirty days' time given to file a bill of exceptions. No bill was filed within the time given. At the same term of court, on the 23d day of December, 1895, judgment was rendered on the verdict and thirty days' time given to file a bill of exceptions, "and it is ordered that the time heretofore given said defendant in which to file a bill of exceptions be, and the same is hereby extended thirty days from this date." On the 2d day of January, 1896, bill of exceptions number one, and bill of exceptions number two were filed and have been certified as a part of the record.

Section 1916, Burns' R. S. 1894, provides, "All bills of exceptions, in a criminal prosecution, must be made out and presented to the judge at the time of the trial, or within such time thereafter as the judge may allow, not exceeding sixty days from the time judgment is rendered."

The record shows that within the time allowed by the court after judgment was rendered, the appellant filed his bill of exceptions.

In a criminal cause the trial is not concluded until judgment is rendered and until that time the power of the court to extend the time of making out and presenting a bill of exceptions is not exhausted. *Barnaby v. State*, 106 Ind. 539.

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In defining the word "trial" it was said in *Sturgeon v. Gray*, 96 Ind. 166, that, "The word 'trial,' as used in the above section, must be held to include all the steps taken in the cause, from its submission to the jury to the rendition of the judgment."

The case of *Kelsey v. Hay*, 84 Ind. 189, cited by appellant, was a civil cause and is based upon a statute, the phraseology of which is unlike the statute above set out.

The appellant asked that the following instruction be given, which was refused: "5. The defendant can not be found guilty by you in this case unless you find him guilty of having violated all the provisions of section four of the act of March 11th, 1895, under which this prosecution is brought." This was not error. *State v. Gerhardt*, 145 Ind. 439.

Appellant's counsel insist that the court erred in giving oral instructions to the jury after having been requested to give all instructions in writing, while the State contends that the record does not affirmatively show that the court was requested, before the beginning of the argument, to instruct the jury in writing, and for that reason no question can be raised as to the giving of oral instructions.

Section 1892, Burns' R. S. 1894 (1823, Horner's R. S. 1896), Subdiv. 5, provides that, "The court must then charge the jury; which charge, upon the request of the prosecuting attorney, the defendant or his counsel, made at any time before the commencement of the argument, shall be in writing, and the instructions therein contained numbered and signed by the court."

The bill of exceptions states that it contains all the instructions given by the court at the request of the appellant, and also the instructions given by the court of its own motion; and that it contains all the instruc-

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tions, oral and written, given at the trial of the cause. It appears from the record that the appellant requested that the instructions to the jury be given in writing. Immediately preceding the instructions given by the court of its own motion, the record says: "defendant having required the court to give its instructions in writing, the court instructs the jury." Then follow the instructions. It is further shown that after the giving of the written instructions the court gave to the jury certain oral instructions; to the giving of which instructions orally, the appellant at the time excepted. The oral instructions are set out in the record. The record further shows that it contains all the instructions written and oral, given in the cause.

It is the law in this State, as declared in numerous decisions, that the record must affirmatively show that the request for written instructions was made before the beginning of the argument. No particular form of words is necessary, but the record must disclose that such a request was so made. That provision of the statute is for the benefit of the trial judge. It is a right upon which he may at all times insist, but we know of no authority denying his power to waive that right. If the request is made before the beginning of the argument, there is no alternative; but if made after the argument has begun and he chooses to comply with it, he certainly has the power to do so.

The duty of framing and settling a bill of exceptions is judicial. It is the duty of the trial judge to see that the bill is framed so that it will express his own judgment and understanding of the facts. Although he may be compelled to settle and sign the proper bill of exceptions, he cannot be compelled by mandamus to put into the bill any matter which, in his judgment,

does not properly belong in it. Elliott's App. Proced., sections 516 and 798.

In *Galvin v. State, ex rel.*, 56 Ind. 51, the following definition of a bill of exceptions was adopted: "A formal statement in writing, of exceptions taken to the opinion, decision or direction of a judge, delivered during the trial of a cause; setting forth the proceedings on the trial, the opinion or decision given, and the exception taken thereto; and sealed by the judge in testimony of its correctness." *Schlunger v. State*, 113 Ind. 295; *Bowen v. State*, 108 Ind. 411.

When a bill has been signed, filed and made a part of the record as required by law, it imports absolute verity. If there is a variance between the bill and order book, or other entries, the bill controls, for the reason that the record and other entries are kept by the clerk, while the bill of exceptions is the act of the judge who signs it. Elliott's App. Proced., section 811. and cases cited in notes.

When the trial judge says in the bill of exceptions that he was required by the defendant to give the jury instructions in writing, and the bill shows that he did instruct in writing, and that after the giving of written instructions he gave the defendant an exception to the giving of an oral instruction, this court must conclude that the proper request for written instructions was made. We must give to the language used its ordinary significance and meaning. We think it affirmatively appears from the record in this cause that the request for written instructions was properly made.

It is shown by the bill that the court at the time of reading the written instructions to the jury, orally instructed them as follows: "If you find the defendant guilty the form of your verdict will be, 'We, the jury, find the defendant guilty as charged in the affidavit,

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and that he be fined ——— dollars;' or you may, if you find the defendant guilty and desire to exempt him from the payment of costs, use the following form, 'We, the jury, find the defendant guilty as charged in the affidavit and assess his punishment at a fine of ——— dollars, and we specially find that he pay no costs.' If, on the other hand, you find the defendant not guilty, the form will be, 'We, the jury, find the defendant not guilty.' In either case the verdict to be signed by your foreman." The bill further shows that "to the giving of each of said oral instructions orally, the defendant at the time excepted."

The court had already instructed the jury in writing that if they found the defendant guilty it was their duty to assess a fine against him in any sum not less than \$10.00 nor more than \$100.00, to which they might add imprisonment in the county jail for any determinate period not exceeding ninety days, and that they might in their verdict assess a fine against the defendant and exempt him from the payment of any or all costs.

In *Littell v. State*, 133 Ind. 577, it was held reversible error where the trial court, after giving written instructions, "orally told the jury that the punishment that they were authorized to inflict upon the defendant, if found guilty of manslaughter, would be not more than twenty-one years nor less than two years."

In *Smurr v. State*, 88 Ind. 504, it was held error to read from the statutes of the State. In *Provines v. Heaston*, 67 Ind. 482, it was held error to orally substitute the word "fairly" for the word "strictly." In *Hopt v. People*, 104 U. S. 631, the trial court indicated a place for the insertion of an extract from a book, which was held error. In *Stephenson v. State*, 110 Ind. 358, the cause was reversed because of the following verbal instruction: "Gentlemen of the jury, if the

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State has failed to make out a case against this defendant beyond a reasonable doubt, or if the defendant by his evidence has raised a reasonable doubt, then your verdict will be as follows: (reading form of verdict for defendant).”

We do not think the oral instruction complained of is an instruction within the meaning of the statute. It told the jury nothing upon the merits of the case. They had already been instructed as to the punishment they might inflict if they found the defendant guilty. That fact distinguishes this case from the case of *Littell v. State, supra*, where it appeared the court had not told the jury the punishment they could inflict, except as stated in the oral instructions. In the case at bar the oral statement contained no rule of law governing the guilt or innocence of the accused, nor was there any rule of law stated by which the jury should be governed in reaching a verdict; but the statement was simply a direction to the jury as to the manner in which they should express their decision of the cause, under the rules of law already given to the jury in writing. *Bradicay v. Waddell*, 95 Ind. 170; *Stanley v. Sutherland*, 54 Ind. 339; *Lehman v. Hawks*, 121 Ind. 541.

Taking the instructions as a whole, they correctly stated the law applicable to the case, and we think sufficiently informed the jury as to their duties in the case.

We find no error in the record for which the judgment should be reversed.

Judgment affirmed.

New York, etc., Railroad Company *v.* Zumbaugh.

NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY *v.* ZUMBAUGH.

[No. 2,030. Filed March 10, 1897.]

RAILROADS.—*Failure to Maintain Proper Cattle-Guards.—Killing of Stock.—Special Finding.*—A special finding that plaintiff's horses wandered upon defendant railroad company's right of way, by reason of the inherently defective cattle-guards maintained at a crossing, is conclusive as to defendant's liability under section 5323, Burns' R. S. 1894.

From the Marshall Circuit Court. *Affirmed.*

C. P. Drummond and Morris, Bell, Barrett & Morris, for appellant.

Charles Kellison, for appellee.

WILEY, J.—This was an action to recover damages for stock killed on appellant's line of railroad. The negligence charged was, in the language of the complaint, "by neglecting to construct and maintain proper and suitable cattle-guards and cattle-pits where a certain highway * * * crosses said road, sufficient to prevent horses and other stock from getting upon the line of defendant's track."

The issue was joined by a general denial and the cause submitted to the court for trial, without the intervention of a jury, and at the request of appellant, the court made a special finding of facts, and stated its conclusions of law thereon, and rendered judgment in favor of the appellee.

It appears from the special finding of facts that the appellee was pasturing two horses in a pasture owned by Henry Zumbaugh, adjoining the appellant's right of way, in Greene township, Marshall county, Indiana; that said pasture was securely fenced; that the

two horses of appellee, with other horses belonging to Henry Zumbaugh, escaped from said pasture by reason of the bars to an opening having been partially displaced by stock pushing against the bar posts, and loosening them; that they were thus enabled to pass out of said opening upon the public highway which crossed defendant's road; that they wandered upon the track of defendant's railroad where it crosses said highway, and there passed over the cattle-guards and got on the right of way, where they were run over and killed; that said horses were not unruly or breachy animals.

The cattle-guard at the point where it is charged, and where the court finds that the horses entered upon appellant's right of way, was what is known and called a "National Surface Guard."

As to the sufficiency and condition of this cattle-guard we must be guided by the finding of the court. In its fourth finding of facts the court says: "And the court further finds that said 'National Surface Guard,' and the cattle-guard at the public highway crossing, on and over which cattle-guard said horses entered upon the defendant's right of way, as heretofore and herein found, were deficient, unfit, unsuitable, and insufficient to turn ordinary stock, and especially deficient, unfit, and insufficient to turn animals of the horse kind on the second day of July, 1893, and before that time, and that at the said highway crossing where said horses entered the defendant's right of way and said right of way was not, at the time said horses entered on and upon said right of way, securely fenced at the place where said horses entered in and upon such right of way. That said cattle-guard was in as good order at the date of the killing as when first put in, the deficiency, unfitness, and insufficiency in said cattle-guard being inherent in its construction,

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and that said cattle-guard, when placed on the railroad track as said guard was placed, was insufficient, unsuitable, and unfit to turn stock generally, and especially stock of the horse kind at the time of said killing.”

This finding is conclusive and binding, and in our judgment clearly shows that the cattle-guard in question was defective and insufficient, and fully sustains the allegation of the complaint as to the negligence of the appellant in not securely fencing its right of way.

Where a railroad company fails to construct and “maintain at all public road and highway crossings, * * * barriers, and cattle-guards suitable and sufficient to prevent cattle, horses, etc., getting on such railroad,” it cannot be said that such railroad is securely fenced, within the meaning and spirit of section 5323, Burns’ R. S. 1894 (4098a, Horner’s R. S. 1896), and where stock wander on a railroad right of way, by reason of insufficient and defective cattle-guards, and are killed or injured, the railroad company will be held liable. *McKinney v. Ohio, etc., R. R. Co.*, 22 Ind. 99; *Indianapolis, etc., R. R. Co. v. Guard*, 24 Ind. 222; *Pennsylvania Co. v. Mitchell*, 124 Ind. 473; *Banister v. Pennsylvania Co.*, 98 Ind. 220; *New York, etc. R. R. Co. v. Zumbaugh*, 11 Ind. App. 107.

This material and ultimate fact having been found adversely to the appellant, we are led to the conclusion that the insufficient and unsuitable condition of the cattle-guard was the proximate cause of the injury, from the consequence of which the appellant can not escape.

Judgment affirmed.

The State, *ex rel.* Denney, *et al.* v. Leach.

THE STATE, EX REL. DENNEY, ET AL. v. LEACH.

[No. 2,112. Filed March 10, 1897.]

INTOXICATING LIQUORS.—*Sales Made by Bartender.—Liability of Principal.—Statute Construed.*—A saloonkeeper is not liable on his bond, under the provisions of section 7279, Burns' R. S. 1894, for the payment of fines and costs assessed against his bartender for an unlawful sale of intoxicating liquor, made by such bartender without the knowledge or consent of his principal.

From the Sullivan Circuit Court. *Affirmed.*

Charles D. Hunt and *W. H. Bridwell*, for appellants.

A. D. Leach and *John S. Bays*, for appellee.

COMSTOCK, C. J.—The appellants, county officials, brought this action against appellee on a bond, alleged to have been executed by him for the purpose of obtaining a license to retail intoxicating liquor. It is alleged that the bond has been lost, that no copy of it is in existence; that the names of the sureties are unknown, and that therefore the principal only is sued.

The action was brought to collect a fine, and costs assessed against the bartender of appellee for an unlawful sale of intoxicating liquor.

The complaint alleges that, after the defendant had executed his bond, as required by statute, and obtained his license, his barkeeper (naming him), at the place where the defendant had been licensed to sell, sold intoxicating liquor to one (giving his name), who was at the time a person under twenty-one years of age; that said barkeeper was indicted therefor by the proper grand jury, arrested, and upon arraignment before the circuit court of Sullivan county, plead

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guilty to said charge, was fined \$20.00 and costs; that said fine and costs have not been paid.

The court below sustained a demurrer to the complaint upon the ground that it did not contain facts sufficient to constitute a cause of action. From that ruling this appeal is taken.

It is evident from the allegations of the complaint that the bond described therein was executed under and pursuant to the provisions of section 4, of "An act to regulate and license the sale of spirituous, vinous, malt and other intoxicating liquors, approved March 17th, 1875."

We set it out: "Section 4. The board of county commissioners, at such term, shall grant a license to such applicant upon his giving bond to the State of Indiana, with at least two freehold sureties, resident within said county, to be approved by the county auditor, in the sum of two thousand dollars, conditioned that he will keep an orderly and peaceable house, and that he will pay all fines and costs that may be assessed against him for any violations of the provisions of this act, and for the payment of all judgments for civil damages growing out of unlawful sales, as provided for in this act." Section 7279, Burns' R. S. 1894.

It has been decided in this and several other States that an action will lie upon bonds given under similar statutes to the one above cited, for civil damages growing out of the unlawful sale of intoxicating liquor when the sale is made by a barkeeper within the scope of his employment, although the principal was not present and did not know or approve of the sale. *Boos v. State, ex rel.*, 11 Ind. App. 257.

We do not know of a decision of the courts of this State holding, in a criminal action for a violation of the statute regulating the sale of intoxicating liquor, the principal subject to punishment by indict-

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ment for the offenses of his servant, committed without his knowledge or consent.

In the 11th volume of Am. and Eng. Ency. of Law, p. 711, a collection of numerous authorities in point is made. We quote from the text: "A licensee, to sell intoxicating liquors, is bound at his peril to see that the conditions of the license are complied with by his servants or agents; but to render a defendant liable for sales made by his agent or servant, knowledge or consent must be shown. To convict in such a case the jury must be satisfied of the defendant's assent to and not merely of his knowledge of the sale; and where a sale is made by an agent or servant in disobedience of orders, the master will not be liable. But a general authority by an employer to his clerk to sell unlawfully, will render him answerable criminally for any single sale made by his clerk in pursuance of such authority." See notes for authorities there cited.

It will be seen by reference to page 718 of the same volume that under the decision of other courts of some of the states (Arkansas, Georgia, and Maryland), a sale of liquor to a minor by a bartender is a sale by the owner for which he is liable, when it was made in the regular course of business, although made without his knowledge and contrary to his instructions.

These decisions are not, however, in harmony with those of the Supreme Court of our own State. We cite *Hipp v. State*, 5 Blackf. 149; *Wetzler v. State*, 18 Ind. 35; *Hanson v. State*, 43 Ind. 550; *Thompson v. State*, 45 Ind. 495; *Wreidt, v. State*, 48 Ind. 579; *O'Leary v. State*, 44 Ind. 91; *Zeller v. State*, 46 Ind. 304.

Each of the decisions in the cases last cited is to the effect that when an unlawful sale is made by the bartender in the saloon of one licensed to sell, in the absence and without the knowledge of his principal, that the principal is not liable.

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In *Hipp v. State, supra*, Blackford, justice, speaking for the court, announced the rule to be “that a master is liable in a *civil suit* for the negligence or unskilfulness of his servant, when he is acting in the employment of his master; but that he is not subject to be punished by *indictment* for the offenses of his servant, unless they were committed by his command, or with his assent.”

Any claim in this action must be based upon a breach of appellee’s bond—the language of the bond—its obligation is that appellee will pay all fines and costs that may be assessed against him for violations of the liquor laws.

Appellants contend that under this language he is liable for the violations of the law of all in his employ.

By the averments of the complaint a judgment was not assessed against the appellee, nor under the decisions of our Supreme Court could a judgment of conviction have been rendered, upon the facts set out.

There was no breach of the bond, and the judgment must be affirmed.

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[No. 2,089. Filed March 11, 1897.]

PARENT AND CHILD.—*When a Liability for Services Rendered.*—

Where a parent and his or her adult children live together as members of the same family, there is no implied undertaking on the part of either to pay for services; but such undertaking may arise not only from an express contract, but it may be inferred from surrounding circumstances. *p. 185.*

SAME.—*Decedent’s Estates.*—*Claim of Mother for Caring for Her Adult Son.*—An adult son, whose mental and physical condition disqualified him from rendering any service, lived with and was cared for by his mother with the express understanding that she

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was to be compensated therefor. The son died intestate, and the mother filed a claim against his estate for such services, which was allowed and paid by the administrator. *Held*, that in the absence of a showing that the amount paid for the services was excessive, and that such services could have been performed for less, that the claim was a proper charge against the estate. *p. 186.*

GUARDIAN AND WARD.—*Appointment of Guardian for Person Alleged to be of Unsound Mind, When Void.—When a Guardian Illegally Appointed may be Regarded as Trustee.*—The appointment of a guardian for a person alleged to be of unsound mind, where the appointment is made without service of process upon, and in the absence of such person is null and void; but one so appointed as guardian acts under color of right and will be regarded as a trustee and will have an equitable right to be reimbursed for all reasonable expenses properly incurred in the execution of the trust. *pp. 186–189.*

From the Greene Circuit Court. *Affirmed.*

I. H. Fowler and W. A. Pickens, for appellant.

Emerson Short, for appellee.

WILEY, J.—Appellee was administrator of the estate of John W. Jessup, deceased, by virtue of an appointment by the Greene Circuit Court. September 2d, 1895, he filed his report in final settlement. The same was endorsed for hearing at a time fixed, and notice given. Appellant appeared and filed exceptions to the report, and also to preceding reports filed by him. The report and the exceptions were submitted to the court for determination, and at the request of appellant, the court made a special finding of facts, and stated its conclusions of law thereon. In so far as the facts found by the court are necessary for the decision of this case, we quote, in brief, from the special findings, as follows:

1. That in 1877, the decedent, John W. Jessup, was a resident of Greene county, Indiana, 30 years of age, and owned an estate of the probable value of fifteen thousand dollars, and that he was insane and incapable of managing his own estate.

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2. That at the September term of the Greene Circuit Court, 1877, a complaint was filed, charging that the said Jessup was insane and incapable of managing his own estate; that the clerk of said court filed an answer in general denial, and upon trial it was adjudged that said decedent was of unsound mind, and incapable of managing his own estate, but that said proceedings were without the issuing, or service of any process or notice on the said Jessup, and that he was not personally present in court.

3. That the court thereupon appointed one Wilbur A. Hayes, guardian of said Jessup as an insane person, who filed his bond, qualified, took upon himself the execution of said trust and filed an inventory thereof, showing the value of said estate to be \$11,765.41.

4. That he took possession of all of said estate and continued in said trust until January 26, 1888, when he filed his final report and resigned his said guardianship; that said report was approved and the guardian discharged.

5. That during said time said Hayes served as such guardian he made disbursements aggregating \$2,402.42; that he returned to his said ward, or to the court in trust for the said ward, property, notes, cash, etc., aggregating \$9,362.99, thereby accounting for the estate which came into his hands the entire amount of \$11,765.41.

6. That about January 1, 1888, while said trust was under the management of said Hayes, said John W. Jessup had an apparent lucid interval; that he took charge of his estate, including a store at Winslow, Indiana, and managed his business with fair prudence until May 1, 1888, when he was taken in charge and lawfully placed in the hospital for the insane, where he remained until September 26, 1889, when he was

thought to be in a dangerous condition and was taken to the home of his mother at Worthington, Indiana.

7. That during the apparent lucid interval mentioned in the last preceding finding, he married the exceptor, Ella Jessup, January 10, 1888; that she had no knowledge of his mental condition, or that any one had ever acted or assumed to act as his guardian; that they were lawfully married and that he died May 22, 1893, without issue of his body, leaving as his sole heirs his wife, Ella Jessup, the exceptor, and his mother, Charlotte Jessup.

8. That on May 1, 1889, the Greene Circuit Court appointed one J. O. Burbank as guardian of decedent, as successor of said Hayes; that he inventoried said estate and by said inventory the personal assets of said estate were valued at \$6,638.62; that the same was a full and fair statement thereof; that he gave bond and entered upon his duties and so acted until May 21, 1890, when he made his final report, resigned his said trust and was discharged therefrom.

9. That during the time he was, and acted as guardian he made expenditures aggregating \$6,638.62, including a deficit in the sale of the stock of goods of \$684.98; including, also, amount returned to the clerk for the benefit of the ward, \$4,264.72, accounts and cash returned to the clerk, \$266.32.

10. That on May 20, 1890, the court appointed Fred L. Jessup, a brother of decedent, as guardian to succeed the said Burbank; that he filed his bond, was qualified, and entered upon the discharge of his trust and continued to act until May 22, 1893, when said ward died.

11. That said last named guardian filed his inventory of said estate showing its value to be \$6,191.27, and that it was a full and fair statement and valuation of the personal estate of said Jessup.

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12. That the said Ella Jessup, in August, 1895, commenced a proceeding in the Greene Circuit Court against John W. Jessup, Charlotte Jessup and Fred L. Jessup to set aside and vacate the order and judgment of the said court in declaring the said Jessup to be of unsound mind and appointing a guardian therefor, and upon a trial of said cause the finding and judgment of said court was against the said Ella Jessup, and that she appealed from said judgment so entered against her to the Appellate Court, which said court reversed the said judgment and finding of the Greene Circuit Court and declared that the original judgment appointing a guardian for the said Jessup as an insane person was void and without effect, for the reason that no process or notice had been issued or served upon him, and he was not present in court at the time said judgment was rendered.

13. That said Fred L. Jessup, while acting as such guardian, made expenditures for and on account of said estate aggregating \$1,881.49, which left a balance in his hands as such guardian of \$4,309.78.

14. That all the doings of each of said guardians, Hayes, Burbank and Jessup, were done by each of them in a fair and prudent manner, in good faith, and under the belief that their said appointments by the Greene Circuit Court were regular and lawful, and that all their reports as such guardians to the Greene Circuit Court were by said court in all things approved, prior to the said decision of the Appellate Court and subsequent trial mentioned in the preceding finding.

15. That the several sums expended by said guardians, as shown by their respective reports, and by the findings herein, for merchandise, bills, purchase money on real estate, clothing and comforts for said John W. Jessup, and the payment to one Cockerly for

services rendered said estate, for taxes, insurance, repairs of real estate, etc., so far as previously contracted by said John W. Jessup, were his valid obligations and that those not so contracted, but which were paid by said guardians, were reasonable charges for the matters for which they were expended, and the expenditures made by said guardians for insurance and repairs to real estate, were reasonably necessary for the preservation of the property of said John W. Jessup.

16. That the sums expended by said several guardians in the management of the business and estate of said John W. Jessup for his board and keeping, care, costs, attorney's fees and guardians' fees and expenses were reasonable charges for such services.

17. That the items of money paid by said several guardians to the said John W. Jessup were needed by said John W. Jessup and paid under proper and prudent circumstances.

18. That the said John W. Jessup died in Greene county, Indiana, May 22, 1893, intestate, and on May 26, 1893, the said Fred L. Jessup was, by the Greene Circuit Court, duly appointed and qualified as administrator of the estate of John W. Jessup, and took upon himself the discharge of the duties of said administration; that as such administrator he charged himself with the balance in his hands, upon filing his said final report as guardian, in the sum of \$4,309.78, and inventoried other personal property in the sum of \$50.00, which two sums then comprised all his personal estate.

19. That at the time said John W. Jessup was taken from the insane hospital to the home of his mother, his said wife, Ella Jessup, asked and demanded of the said Burbank, who was then acting as his guardian, and also of the said Charlotte Jessup, that she be al-

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lowed to nurse, care and keep him, which was by them refused, and that the said Ella Jessup was then able and willing and ready to so nurse, care and keep said John W. Jessup; that after the appointment of the said Fred L. Jessup as guardian, as aforesaid, the said Ella Jessup was still able, ready and willing to nurse, care and keep said John W. Jessup, and then made a like request and demand of the said Fred L. Jessup, and also of the said Charlotte Jessup, which was by them refused.

20. That the said Fred L. Jessup, as such guardian, made a contract with the said Charlotte Jessup to nurse, care and keep the said John W. Jessup for hire; that under said contract the said Charlotte Jessup did nurse, care for and keep the said John W. Jessup to the date of his death, and received pay for the same from the said Fred L. Jessup, as administrator, in the sum of \$477.00, which was a reasonable charge for the services rendered, and was paid on claim filed by said Charlotte Jessup in the Greene Circuit Court, and allowed by the said court.

21. That said Fred L. Jessup at the time of his appointment, charged himself with the sum of \$4,359.78, and that he subsequently charged himself with an additional sum of \$406.75, which was interest collected on outstanding notes, making a total charge against him, as such administrator, \$4,766.53; that said administrator has made two reports, which includes his final report, and which show in detail the total amount paid out by him to be \$2,760.16.

22. That all the money paid out by guardians and administrator for boarding, nursing, caring for and keeping said John W. Jessup was paid for such services rendered after the said John W. Jessup became insane and while he was in fact insane.

23. That the said Charlotte Jessup, mother of the

said John W. Jessup, at the time she nursed and cared for him, as set forth in these findings, owned a house and lot in the town of Worthington, Indiana, of the value of \$800.00, and that the same was all the property and estate she owned.

The court also found that there were certain heirlooms belonging to said decedent, which the administrator had not inventoried or given any account of, consisting of a wardrobe, watch and diploma,—that should be turned over to the appellant, which was done.

Upon the foregoing facts as found by the court, the court stated its conclusions of law. For the purpose of the decision of this case, we need not refer to but two of the conclusions of law as stated, to-wit: the third and fourth, which are as follows:

“Third. That the final report of said Fred L. Jessup as administrator, is lawful and should be in all things approved and that the administration of said estate by the said Fred L. Jessup should be approved except as to his failure to turn over to said Ella Jessup the said wardrobe, watch and diploma.

“Fourth. That upon the delivery of possession of the same to the said Ella Jessup by said administrator, said estate should be adjudged settled as shown by said final report.”

The appellant excepted to each conclusion of law and the court entered an order declaring said estate settled, and discharged the administrator; and to this order and judgment of the court the appellant also excepted. The appellant then moved the court for a judgment in her favor on each and all of the special facts found and on each and all of the conclusions of law as stated by the court; which motion was overruled, and she excepted.

The appellant has assigned four errors in this court,

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but we think that the only one that need be discussed is the first, and that is, that the court erred in each and every conclusion of law.

Appellant admits that, notwithstanding the proceedings declaring Jessup insane, and appointing guardians over his person and property, were void, the greater part of the expenditures of the three several guardians appointed, while acting as such, were correct, on the ground that they were in the interest of the estate; but she complains that there is no warrant in law to uphold the several amounts allowed the guardians for their expenses and services, and amounts paid out as attorney's fees and costs, and the amount of \$477.00, paid to Charlotte Jessup, the mother of the decedent, by the administrator. Objection is urged to the last item, on the ground that where a parent renders services for a child, or *vice versa*, there is no liability to pay, in the absence of an express or implied contract.

We agree with appellant that this is the general rule, but there are exceptions to it. This rule has its foundation in the sacred and close relations of the family. The rule, briefly stated, is, that where a parent and his or her adult children live together as members of the same family, there is no implied undertaking on the part of either to pay for services; but such undertaking may always arise, not only from an express contract, but it may be inferred from surrounding circumstances. *Story v. Story*, 1 Ind. App. 284; *Hilbish v. Hilbish*, 71 Ind. 27; *Smith v. Denman*, 48 Ind. 65; *King's Admr. v. Kelly*, 28 Ind. 89.

The Supreme Court, speaking by Olds, J., in *Hill v. Hill*, 121 Ind. 255, state the rule as follows: "Where near relatives, either by blood or marriage, reside together as one common family, the one furnishing board, lodging, clothing or other necessities or com-

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forts of life, and the other in return renders services, a presumption arises that neither party intended to receive or to pay a compensation for the board or other necessities or comforts furnished on the one hand or services rendered on the other."

In legal contemplation, under the facts as found and stated by the court, Charlotte Jessup and the decedent were not living together as one common family, for the decedent had, long before he was declared insane, left his parental home, and he was not a member of his mother's family in any legal or domestic sense. It does not appear from the facts found that he was rendering her any service, but that he was there in a state of mind and condition of body that rendered him wholly incapable of rendering any service whatever to his mother, and that she rendered the services in good faith and with an express understanding she was to be compensated therefor. In the absence of a showing that the amount paid for the services of his mother was excessive, and that such services could have been performed for less expense to his estate, we are of the opinion that the allowance to her was a proper charge against his estate, and that the court did not err in allowing the administrator therefor.

Appellant also contends that the court below should have disapproved the final report of appellee as administrator, and directed him to proceed against the several guardians that preceded him, in their individual capacities, to recover from them, for the use and benefit of the estate, the several amounts charged and allowed them for their personal services and expenses, and for the amounts paid out for attorney's fees and costs.

We cannot agree with appellant in this contention. The court found and stated in its special findings, that

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at the time the first guardian was appointed the decedent was insane and incapable of managing his own estate; that he remained in that condition up to the time of his death, except "an apparent lucid interval * * * during which time he managed his business with fair prudence," etc. And that all of the items and amounts paid out by said guardians in managing and conducting said trust were reasonable and just charges against his estate.

It is not contended that any fraud was practiced on the part of the guardians; that they profited at the expense of the trust, nor that they were not acting in good faith. All their acts and doings were reported to the court having jurisdiction of the subject-matter, and were approved; and while they were chargable with the knowledge of the infirmity in the proceedings appointing them, a court of equity will not lend its aid to hold them personally liable for doing the very things that the court declares to have been done in the best interests of the trust, and for which they were presuming to act.

The Greene Circuit Court having, in a proceeding without notice, or the presence of the decedent in court, declared him insane, and appointed for his person and property a guardian, was without jurisdiction over his person, and the proceedings were a nullity, and void. *Jessup v. Jessup*, 7 Ind. App. 573.

The guardians appointed by the court were at least acting under color of right and did in fact manage the estate of decedent with fidelity, prudence and care, and with reasonable economy. Under such facts we must regard them as trustees.

In the well-considered case of *Curran v. Abbott*, 141 Ind. 492, the Supreme Court, speaking by Monks, J., said: "It is well settled law that a trustee has an equitable right to be reimbursed for all reasonable ex-

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penses properly incurred in the execution of his trust, and that the expenses of a trustee in the execution of his trust are a lien upon the estate."

In Perry on Trusts, it is said: "Trustees have an inherent equitable right to be reimbursed all expenses which they reasonably and properly incur in the execution of the trust. * * * If a person undertakes an office for another in relation to property, he has a natural right to be reimbursed all the money necessarily expended in the performance of the duty. * * * Thus a trustee would be reimbursed all his necessary traveling expenses, and all reasonable fees paid for legal advice in the discharge of his duties. And this rule would be applied, although the trust subsequently was declared void, if the trustees were without blame in the matter. So trustees will be allowed all the expenses of litigation, * * * and all costs which they are forced to pay to strangers, if the litigation was forced upon them, or was necessary for the protection of the estate. * * * Allowances for legal expenses and costs are always within the discretion of the court; and such claims can be modified and reduced, if in the judgment of the court they are unreasonable." Perry on Trusts, section 910.

The adjudicated cases are in harmony with the principles stated by Mr. Perry. *Jones v. Dawson*, 19 Ala. 672; *Love v. Morris*, 13 Ga. 165; *Rensselaer, etc., R. Co. v. Miller*, 47 Vt. 146; *McElhenny's Appeal*, 46 Pa. St. 347; *Wilson's Appeal*, 41 Pa. St. 94; *Worrall v. Harford*, 8 Ves. 3; *Dawson v. Clarke*, 18 Ves. 247.

Applying these principles to the facts in this case, it seems to us that it would be a harsh measure of justice and most unconscionable and inequitable to say that the several trustees who undertook to subserve and protect the interests of the estate of the

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decedent, should be held personally liable for all moneys allowed them by a court of equity for their services and expenses and costs reasonably incurred.

The proof to our mind is very satisfactory that they each earned all that the court allowed them and that they did not in any manner dissipate the estate, but, on the contrary, protected and fostered it to the best interests of the decedent.

With the fact before us that the management of the trust in the hands of these several trustees was faithful, honest and fair, and that they acted in good faith and accounted for all the assets of the estate that came into their possession, we are clearly of the opinion that the court below exercised a sound and wise discretion in approving the final report of the administrator and discharging him from any further liability.

There is no error in the record and the judgment is affirmed.

THE BALTIMORE AND OHIO RAILROAD COMPANY
v. NORRIS.

[No. 2,092. Filed March 11, 1897.]

CARRIERS.—*Willful Injury of Trespasser by Conductor.—Liability of Company.*—Where the conductor of a passenger train, while acting within the scope of his authority in ejecting a trespasser from the train, willfully injures such trespasser, the company is liable. *p. 193.*

SAME.—*Passenger.—Offer of Fare.*—Where a person goes to a railroad station to take passage to a certain other station, and, finding the ticket office closed, gets upon the train without a ticket, and without knowledge that the train does not stop at the station to which he desires to go, he is entitled, by payment of the fare to the next regular stopping station, to remain upon the train. *pp. 191-195.*

SAME.—*Tender of Fare by Third Party.—Wrongful Ejection of Passenger.*—Plaintiff, in company with others, took passage upon a railroad train to go to a certain other station, not knowing at the time that the train did not stop at such station. Plaintiff offered

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the cash fare to the station to which he desired to go, which was refused by the conductor. (A companion of plaintiff then stated that he would pay plaintiff's fare to the next regular stopping station, and took out his money, having more than enough money to pay the fare, but the conductor refused to receive the fare and compelled plaintiff to get off the train. *Held*, that the offer to pay the fare was sufficient to make the expulsion wrongful. *pp.* 195, 196.

SAME.—*Provocation.*—*Ejection of Passenger.*—A railroad company cannot justify the act of its conductor in the ejection of a passenger, whose fare had been tendered, on the ground that in an altercation at the time between the passenger and the conductor, the passenger accused the conductor of violating a rule of the company on a former occasion, which violation he threatened to report to the company. *pp.* 196, 197.

From the DeKalb Circuit Court. *Affirmed.*

J. H. Collins and *James E. Rose*, for appellant.

S. A. Wood, *Daniel M. Link*, *John F. Shuman* and *Frank S. Roby*, for appellee.

BLACK, J.—The appellee sued the appellant and recovered judgment for \$150.00, for the acts of a conductor upon appellant's passenger train, into one of the cars of which the appellee had gone for the purpose of traveling from appellant's station at Garrett to its station at Albion, the alleged wrongs complained of being the assaulting of the appellee with force and violence while in said car, and the act of said conductor in ejecting the appellee from said train with unnecessary force, at night, at a dangerous place, away from any dwelling, station or stopping place, said conductor accompanying his acts with opprobrious and indecent epithets applied to the appellee in the presence and hearing of other passengers.

The argument on behalf of appellant is so general in its character that it is not quite clear that any portion of it should be treated as relating properly to the assignment that the court erred in overruling the demurrer to the complaint.

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In the course of the argument in appellant's brief, however, it is said: "If the complaint or the evidence had either shown that the appellee was lawfully upon the train, then the complaint would have been sufficient; otherwise not."

The complaint contained two paragraphs, the second of which alleged many facts in addition to those alleged in the first, and amongst other things, showed, in substance, that the appellee having been prevented by the fact that the ticket office was closed from purchasing a ticket or ascertaining at what places the train stopped to receive and deliver passengers after leaving Garrett, and having seated himself in the car, and taken passage thereon, he tendered to the conductor, when he came through the car, payment of the regular cash fare charged by the appellant for transportation between said towns; that he was then informed and for the first time learned that the train did not stop to take on and deliver passengers at Albion; that he thereupon offered to pay and tendered to the conductor payment of the regular cash fare charged by the appellant from Garrett to the first regular stopping place of the train, before he was ordered to leave the train, and before any active steps had been taken to eject him therefrom; that the conductor wrongfully refused to receive said fare; that by the rules and regulations of the appellant the train was scheduled to stop at the town of Walkerton to discharge passengers, and that the appellee offered to pay his fare to that town, but the appellant wrongfully refused to receive said fare, or to transport him to that town, but wrongfully and unlawfully ejected him from the train, etc.

The first paragraph contained an allegation that after the appellee offered and tendered to the conductor the regular cash fare charged by the appellant

for transportation between Garrett and Albion, the appellant by its said conductor with force and violence assaulted the appellee.

If the first paragraph did not show the appellee to be entitled to be considered a passenger, but showed him to be a trespasser, still the appellant was bound not to injure him willfully.

In *Lake Erie, etc., R. R. Co. v. Matthews*, 13 Ind. App. 355, this court said: "The wrong charged is in the nature of a willful injury, and if the appellee was guilty of negligence or was even guilty of being a trespasser, a willful or wanton injury, would not be justifiable. If the appellee was not entitled to ride upon the train, the conductor should have requested him to alight. It was time enough to resort to force and violence when the same became necessary."

Very many authorities might be cited to the same effect.

If it could be held that the second paragraph did not proceed upon the theory of an unlawful expulsion, and did not show the appellee to have been a passenger, but, on the contrary, showed him to have been a trespasser, that paragraph could not, on that account, be held insufficient; for it was alleged therein that the appellee used no force in resisting ejection, but in all things conducted himself in an orderly, proper and law-abiding manner, and that the conductor, in ejecting him, used unnecessary force, and accompanied his acts with opprobrious and indecent language and epithets, which he applied to the appellee in the presence and hearing of a number of persons in the car; that the appellee was greatly humiliated and mortified thereby, and put in great anxiety of mind; and that he was disgraced in the eyes of the persons who heard said language and were not familiar with the facts.

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All such injury is willful, and being inflicted by the conductor while acting within the scope of his authority, the appellant would be liable therefor, whether the injured person were a passenger or a trespasser.

It is said in the recent valuable work, Elliott on Railroads, section 1255, that the company may be held liable, "although the injured person be a trespasser, if its employes, while acting within the scope of their actual authority, willfully injure him or eject him with unnecessary force and violence."

In *Chicago, etc., R. R. Co. v. Bills*, 118 Ind. 221, in the original complaint the plaintiff sought to recover for injuries sustained to his person and property while being wrongfully expelled from the defendant's cars. An amended complaint counted upon a right to recover for injuries suffered by being expelled from the train with unnecessary force. It was said by the court: "Both complaints involve the same transaction. The *gravamen*, or substantial grievance complained of in both, is the personal injury suffered by the plaintiff in being ejected from the defendant's train. The original complaint proceeded upon the theory that the plaintiff sustained an injury to his person by being wrongfully expelled from a train on which he had a right to be. The amended complaint is predicated upon the same transaction and injury, but proceeds upon the theory that the plaintiff may have been wrongfully or carelessly on the train, and that he was ejected therefrom with unnecessary force, to his injury. The first complaint was more comprehensive than the last, and embraced elements of damage which were not in the amended complaint, but the last embraced nothing that was not covered by the first."

In the same case it is said by the court, that expulsion from a train with excessive force and violence is equivalent to an assault and battery, and that no degree of carelessness on the part of the person assaulted furnishes any excuse for an unlawful invasion of the right of personal security.

A railroad company is liable to one who has been ejected from a train by the conductor with unnecessary force, though the latter had a right to expel such person. *Chicago, etc., R. R. Co. v. Bills*, 104 Ind. 13.

But we are of the opinion that the second paragraph of the complaint proceeded upon the theory of a wrongful expulsion of a passenger, and that it may be held sufficient as such a complaint.

In *Columbus, etc., R. W. Co. v. Powell*, 40 Ind. 37, it was held, that, notwithstanding the fact that the plaintiff's intestate got on the train by mistake, the relation of passenger and carrier existed.

Such a person is entitled to be treated as a passenger while on the train. *Cincinnati, etc., R. R. Co. v. Carper*, 112 Ind. 26; *Lake Erie, etc., R. R. Co. v. Mays*, 4 Ind. App. 413; *Ham v. Canal Co.*, 142 Pa. St. 617; *Louisville, etc., R. R. Co. v. Garrett*, 8 Lea 438, 41 Am. Rep. 640.

It is true that, in the absence of statutory provisions to the contrary, a railroad company may make rules providing that particular trains shall stop only at certain stations, when it furnishes reasonable means (the want of which is not asserted in this case), of reaching all stations on its road by other trains; and that it is the duty of a person taking passage on a train to inform himself when, where and how he can stop, according to the regulations and time card of the railroad company. If he makes a mistake, not induced by the company, he has no remedy against the company for its enforcement of such rule. Elliott

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on Railroads, sections 200, 1576 and 1593; *Ohio, etc., R. W. Co. v. Applewhite*, 52 Ind. 540; *Pittsburgh, etc., R. W. Co. v. Nuzum*, 50 Ind. 141.

It is the duty of the person about to become a passenger to use reasonable diligence to acquaint himself with such a rule. *Pittsburgh, etc., R. W. Co. v. Lightcap*, 7 Ind. App. 249.

We think the second paragraph of the complaint at least showed diligence on the part of the appellee sufficient to relieve him from the imputation of being a trespasser in entering the car, and to entitle him to be treated as a passenger; and, though he had no right to require the conductor to deviate from the rule and to demand to be put down at Albion, he could lawfully remain upon the train as a passenger, by paying his fare to the first regular stopping station, which he offered to do. *Pittsburgh, etc., R. W. Co. v. Lightcap, supra*.

There was a special verdict consisting of interrogatories and the answers of the jury thereto:

The action of the court in rendering judgment upon the verdict is not mentioned in argument, but it is contended on behalf of the appellant that the special verdict was contrary to law and not sustained by sufficient evidence, and that the damages were excessive.

A question is suggested in argument as to the manner in which the offer to pay fare to the first stopping place was made. It appears from the evidence that the appellee was accompanied by four other men; that when the appellee had tendered the amount of the fare from Garrett to Albion to the conductor, and had been informed by the latter that the train would not stop at Albion, and before the conductor had ordered him off or had made any attempt to stop the train, one of appellee's companions offered to pay the fare for the whole party to the next stopping place,

and took out his pocketbook and money, having more than sufficient so to pay, but the conductor refused to carry them, and compelled them to get off the train.

In *Ham v. Canal Co., supra*, it was held that if an actual tender of fare be made before the train has been stopped the conductor cannot refuse it, no matter who made the tender.

In *O'Brien v. New York, etc., R. R. Co.*, 80 N. Y. 236, it was held that where the train has not been stopped for the sole purpose of putting the passenger off, if, before being ejected, he or others in his behalf offer to pay the full fare, the conductor should accept it; and that, if he refuses to do so and ejects the passenger, the company will be liable.

In *Louisville, etc., R. R. Co. v. Garrett, supra*, where the conductor had taken hold of the passenger (who had offered, ignorantly and in good faith, a tax receipt in payment of his fare, and was unable to pay), and was walking with him to the door of the car, after ringing the bell to stop the train, and, as he opened the door, another passenger said, "Let him go back; I will pay his fare," and the conductor heard the offer, but ejected the plaintiff, it was held that it was correct to instruct the jury, that if another person offered to pay the fare before ejection from the car, the carrier was bound to receive it and transport the passenger. See *Clark v. Railroad Co.*, 91 N. C. 506.

We think the offer to pay fare, shown, as above stated, by evidence, in the case at bar, was sufficient to make the expulsion wrongful.

A question is discussed in the briefs, relating to an altercation between the appellee and the conductor, the evidence of which, it is claimed, showed the appellee to be equally in fault with the conductor. It was in evidence that when the conductor came to the appellee, the latter placed in the hand of the former a

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certain sum, being the fare from Garrett to Albion; that the conductor said, "Where the hell are you going?" and the appellee said he was going to Albion; that the conductor said that the train did not stop there; that the appellee said he guessed it did, as he had ridden upon that train before, and it always stopped; that the appellee had ridden on the train before; that the conductor said, "You knew this train didn't stop at Albion" (interjecting an abusive and indecent epithet); "what in the hell are you on this train for?"

Afterward, the conductor having said something to one of the party about losing his job if he should stop, the conductor was told by the appellee that he had paid him the cash fare from Auburn Junction to Albion at a previous date, and that he, the conductor, had accepted the cash, stopped his train and let the appellee off at Albion, and did not give the appellee a cash receipt; and the appellee threatened to report the conductor for what he had done on that previous occasion.

It is claimed, in effect, that this language of the appellee was a sufficient provocation for the conduct of the conductor.

It must be observed that, if the evidence for the appellee be accepted as true, the conductor himself commenced the abusive altercation and was guilty of the first offensive provocation. Under such circumstances we cannot regard the language of the appellee as so disorderly as to authorize his expulsion after the offer to pay his fare. *Louisville, etc., R. W. Co. v. Wolfe*, 128 Ind. 347; *Chicago, etc., R. R. Co. v. Flexman*, 103 Ill. 546, 8 Am. and Eng. R. R. Cases, 354.

The amount of the damages was so much within the province of the jury that it would be improper for us to interfere with the result reached by them upon that

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question. *Louisville, etc., R. W. Co. v. Goben*, 15 Ind. App. 123.

We do not find any available error.
Judgment affirmed.

BRANIGAN v. HENDRICKSON.

[No. 2,184. Filed March 11, 1897.]

SALES.—*Executed and Executory Contracts.—Remedies for Breach Of.*—In a bargain and sale the subject of the contract becomes the property of the buyer the moment the contract is concluded, whether the goods are delivered to the buyer, or remain in the possession of the seller. In an executory contract the goods remain the property of the seller until the contract is executed. In case of sale the buyer can claim the specific goods, and they are at his risk. In case of executory contract the purchaser does not become the owner, and the goods are not at his risk. His remedy, if there be a breach, is confined to an action for damages. pp. 200, 201.

CONTRACTS.—*Whether Executed or Executory a Question of Fact.*—Whether any particular contract is executed or executory is generally a question of fact depending upon the intention of the parties to be gathered from the terms and stipulations of the agreement. p. 201.

SALES.—*Executory Contract.*—A contract for the purchase of hogs, stipulating that the seller is to retain and feed the hogs corn till a certain date, at which time the buyer is to pay balance on purchase price, and the hogs be weighed at certain scales, and delivered, and in case the hogs should get sick the buyer to take them at once or release all claim to them, is an executory contract. p. 203.

From the Monroe Circuit Court. *Affirmed.*

H. C. Duncan and I. C. Batman, for appellant.

J. E. Henley and J. B. Wilson, for appellee.

COMSTOCK, C. J.—The appellant prosecuted this case in the court below to recover the possession of 39 fat hogs of the alleged value of \$260.00, and damages for the detention of the same. The suit was an ordinary suit for replevin. The defendant failing to

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file bond within the time limited, the plaintiff filed the bond and took possession of the property.

Issues were joined, the case submitted to a jury, at the defendant's request a special verdict was returned.

The plaintiff moved the court for judgment on the verdict. The court overruled the motion, to which ruling exception was taken. The defendant then moved for judgment, which motion was sustained, and the plaintiff excepted.

But two errors are assigned in this court, viz.: The court erred in overruling plaintiff's motion for judgment in his favor. The court erred in sustaining defendant's motion for judgment in his favor on the special verdict.

The jury found that the defendant on the 18th day of December, 1895, was the owner of about forty head of hogs, on the farm of Thomas McGinnis, in Marion township, Monroe county, Indiana; that on said date defendant contracted said hogs to the plaintiff at 3 1-4 cents a pound to be delivered between January 15, and 25, 1896, plaintiff paying, through Joseph Hadden, \$10.00 on said contract, and was to pay on said contract, on or before January 13, 1896, \$150.00. Early on the morning of the said 13th day of January he went to the residence of defendant for the purpose of seeing about said hogs; and left word with the family of defendant to meet him at the shop of said Hadden; Hendrickson met plaintiff that afternoon at the shop of Hadden, plaintiff told him that he had come to comply with the contract; defendant told him that he could not have the hogs and refused to receive any money from him, and refused to let him have the hogs; plaintiff at that time informed defendant that he was ready to pay the money on the contract. Plaintiff at that time had the money to pay on said hogs; that

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early on the morning of the 23d day of January, 1896, one Devee had the money to pay plaintiff for said hogs, and, for defendant, offered to pay for, and demanded them; defendant refused to take the money, refused to let him have the hogs, and told him that Branigan could not have them. Said hogs were at that time in Monroe county, Indiana. That said Hendrickson sold said hogs preceding the 23d day of January, 1896, to one Cunningham, of Martinsville, Indiana, and drove, and had them weighed there, on the 23d day of January. Defendant did not at any time notify plaintiff to take the hogs, nor that they were ready for him, nor demand any money on account of said hogs. That plaintiff sustained damages in the sum of \$16.00 by reason of the defendant's failure to deliver said hogs. Defendant did not repay plaintiff the \$10.00 paid him on said contract. That it was a part of the contract that the hogs were to be weighed before they were delivered at the scales of James Riddle; that defendant was to feed them corn until the 15th to 25th of January, 1896; that if any of the hogs should get sick before the time of delivery said plaintiff should at once receive them or release all claim to them. Said hogs were not weighed at the scales of Riddle; plaintiff did not make an unconditional tender of \$150.00, on or before January 13, 1896; plaintiff never paid defendant but the said \$10.00 on said contract.

The foregoing findings are all the facts, as to the purchase of the hogs, on which appellant bases his right to judgment in the lower court.

The question presented is whether, under the facts found, the transaction was an actual sale, or an executory contract. In a bargain and sale the subject of the contract becomes the property of the buyer the moment the contract is concluded, whether the goods are delivered to the buyer, or remain in the possession

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of the seller. In the executory contract the goods remain the property of the seller until the contract is executed. In case of sale the buyer can claim the specific goods, and they are at his risk. In case of an executory contract the purchaser does not become the owner, they are not at his risk. His remedy, if there be a breach, is confined to an action for damages.

Whether any particular contract is the one or the other is, generally, a question of fact, depending upon the intention of the parties to be gathered from the terms and stipulations of the agreement. See *Lester v. East*, 49 Ind. 588, and cases there cited.

Benjamin in his "Principles of Sales," pages 7, 67, states the rule as follows: "If the property by the terms of the agreement passes immediately to the buyer, the contract is deemed a bargain and sale; but if the property in the thing sold is to remain for a time in the seller, and only to pass at a future time or on certain conditions inconsistent with its immediate transfer, the contract is deemed an executory contract. * * * Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred."

Lester v. East, *supra*, furnishes an instructive collection of decisions of our Supreme Court upon this subject. *Straus v. Ross*, 25 Ind. 300, is one of them. It is there held that where the seller contracted to sell and deliver to the purchaser his clips of wool at a stipulated price per pound, part of which was paid in hand, the purchaser was to go to the house of the seller on a particular day and the parties were then to go to town where the wool was to be weighed and where the purchaser was to pay the residue of the price and receive the wool. The purchaser called for, and was refused the wool. The court held that the

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contract was executory and that the property in the wool did not pass, the court stating that "something remaining to be done to make it a sale. The wool was to be taken to Rushville, and there weighed. * * * This was an essential point of the contract of sale, and until it was done the property in the wool did not vest in the appellant."

In the last mentioned case there was no uncertainty as to the property, the price per pound was agreed upon, there was part payment; there remained only the payment of the balance, the weighing and delivery.

In *Bradley v. Michael*, 1 Ind. 551, also cited in *Lester v. East, supra*, the cattle in controversy sold were sufficiently designated, the price agreed upon, and part of it paid, part of the cattle were delivered; the court held that the property in all the cattle passed, but that the seller had a lien on the cattle not delivered for the residue of the agreed price, without the payment of which the purchaser had no right to the possession; that the payment of the balance was a condition precedent to plaintiff's right to possession.

In *Henline v. Hall*, 4 Ind. 189, also cited in *Lester v. East, supra*, Henline sold a colt to Hall; it was agreed that the colt should run with the mare (which belonged to Henline and was in his possession) until it was weaned, at which time it should be delivered to Hall, who was at that time to pay the price stipulated; that when the colt was weaned and before the commencement of the suit, Hall tendered the price agreed, and demanded the colt. The court held that the contract fixed the price, the time for payment, and designated the property sold; that the property was thus vested in the buyer and placed at his risk from the moment the bargain was closed, without actual payment or present delivery. The court, in *Lester v. East*,

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supra, distinguishes that case from those in which it is held that the property is not changed because something remains to be done by the seller to the article sold, to place it in a condition for delivery; as, for example, to ascertain the particular chattel or to set apart the specific goods, number or quantity, by measurement, etc.; that there would be no change of property until those acts were done.

In *Dixon v. Duke*, 85 Ind. 434, the court held that contract of purchase to be executory for the reason that two things remained to be done,—delivery of the wheat contracted, and payment of the price agreed; citing among other cases, *Straus v. Ross*, *supra*, and *Lester v. East*, *supra*.

Counsel for appellant, in their able brief, cite *Bertelson v. Bower*, 81 Ind. 512, in support of the proposition that title passed in the case at bar. In that case, which grew out of a contract of sale of sheep, the court held that title vested in the purchaser, for no act remained to be done,—“there was no necessity for any weighing or counting.”

In the case at bar, there remained delivery, payment of balance of purchase price, the feeding of corn to a certain date, presumably to prepare them for the market, and the weighing at certain scales. There was in the agreement the stipulation that “in case said hogs should get sick at any time before time of delivery to said Branigan, that said Branigan should receive the said hogs at once or release all claims to them to the said Hendrickson. This stipulation provided for the contingent avoidance of the contract at the option of plaintiff.

The buyer was to pay \$150.00 on or before the 13th day of January, 1896. The jury find that he did not pay, nor unconditionally tender payment of more than the \$10.00 paid on the day the contract was entered

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into. It is true that the jury found that the agent of plaintiff having the money offered to pay it, and that the defendant refused to accept it, and informed him that he could not have the hogs. As the jury find that no unconditional tender of payment was made, the court is left in the dark as to the terms upon which the offer was made. It may have been upon such terms as would have created a new contract. While a refusal to accept money will waive its formal tender, a tender to be good must be without conditions.

The facts found are inconsistent with the theory that the parties intended that the title to the property should pass to the purchaser at the date of the making of the contract in December, 1895.

There is no error. Judgment affirmed.

SHAFFER ET AL. v. THE MILWAUKEE MECHANICS'
INSURANCE COMPANY.

[No. 2,009. Filed March 12, 1897.]

NEW TRIAL.—*When Motion for Must be Made During Term at Which Verdict was Rendered.*—*Courts Will Take Judicial Notice of Terms of Circuit Courts.*—*Statute Construed.*—This court knows judicially that November 14, 1894, the date the verdict was returned, was not the last day of the September term of the Delaware Circuit Court, and as appellants did not make a motion for a new trial during the term at which the cause was tried they waived their right to file a motion for a new trial under section 570, Burns' R. S. 1894, providing that motions for a new trial shall be made during the term of court at which the verdict or decision is rendered, unless the verdict or decision is rendered on the last day of the term, when such motion may be made on the first day of the next term. *p. 208.*

INSURANCE.—*Principal and Agent.*—When an agent is acting within the scope of his agency or authority his knowledge thus obtained is the knowledge of his principal, and his principal is bound by his acts; but where knowledge is obtained by such agent wholly independent of the business or employment of his principal, and in a transaction in which his principal is not connected, such rule will not apply. *p. 212.*

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SAME.—Forfeiture.—Condition as to Mortgage.—Record of Mortgage not Notice to Insurer of the Existence Thereof.—The rule that where the law requires an instrument under seal to be recorded in a public record and that such record is notice to all the world, does not apply to insurance companies that issue policies of insurance with express conditions that the policy shall be void, if the property is, or shall become mortgaged; the insurer is not required to examine the public records to ascertain whether or not the insured is violating a stipulation in his policy by which he must be bound. *pp. 212, 213.*

SAME.—Policy is a Contract Between the Insured and Insurer.—Where the insured accepts his policy, which is his contract, with the knowledge of all of its conditions and stipulations, and at the time of his acceptance takes it with knowledge of a breach thereof on his part, and in the absence of knowledge thereof on the part of insurer, he cannot afterward be heard to complain. *p. 213.*

SAME.—Contract.—Condition.—Forfeiture.—A condition in a policy of insurance, "This entire policy of insurance, unless otherwise provided by agreement endorsed thereon or added thereto, shall be void * * * if the subject of insurance be personal property and be or become incumbered by a chattel mortgage," avoids the policy, where at the time of the issuance of the policy there existed a chattel mortgage on the property embraced in the policy of insurance, the insurer having no knowledge of the existence thereof. *pp. 209-215.*

From the Delaware Circuit Court. *Affirmed.*

James N. Templer and Edward R. Templer, for appellants.

Smiley N. Chambers, Samuel O. Pickens and Charles W. Moores, for appellee.

WILEY, J.—Appellants, Shaffer and Foster, were partners engaged in the business of selling liquors at retail in the city of Muncie, Indiana, under a license issued by the board of commissioners of Delaware county to the appellant, Shaffer. On March 23, 1893, the appellants, Shaffer and Foster, procured the appellee to issue to them a policy of insurance on their saloon and restaurant fixtures and furniture and stock of liquors, contained in a certain building, specif-

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ically described in the complaint, in the sum of \$800.00, and paid the premium thereon, amounting to \$16.00. At the time said policy of insurance was issued, one Clayton B. Templer, of Muncie, was the authorized agent of the appellee to solicit insurance and issue and countersign policies so taken by him. At the time said policy was issued the said Templer had in his employment as clerk one Richman, whose duty it was to solicit for his employer insurance, and who was authorized to collect premiums and sign the name of his said employer to said policies. Prior to March 1, 1893, appellants, Shaffer and Foster, became indebted to The Schmidtt & Brother Company, a corporation of Cincinnati, Ohio, for goods and stock purchased, in the sum of about \$500.00; and on March 21, 1893, they executed to said Schmidtt & Brother Company a chattel mortgage, to secure the payment of said indebtedness, upon all that part of the property covered by the policy of insurance, except the stock of liquors. The appellant, Shaffer, took said mortgage to the office of Clayton B. Templer, in Muncie, Indiana, already filled out, except as to two or three blanks which said Templer filled in, and the said Shaffer signed the firm name to the mortgage, and the said Templer, as a notary public, took the acknowledgment of it, put his seal thereon, and on the same day said mortgage was duly filed in the recorder's office of said county for record. On the 23d day of September, 1893, and while said policy was in force, the building in which the appellants, Shaffer and Foster, were operating their said saloon, and the property covered by said policy and said chattel mortgage, were wholly destroyed by fire.

After the execution of said mortgage, and after the destruction of said property by fire, appellants, Shaffer and Foster, assigned, in writing, said policy of in-

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insurance to The Schmitt & Brother Company, by virtue of which assignment the said Schmitt & Brother Company were authorized to collect and receipt for all the money that might be paid upon said insurance policy. On October 20, 1894, The Schmitt & Brother Company reassigned to Shaffer and Foster an interest in said policy to the amount of \$326.55. After said last assignment The Schmitt & Brother Company, by a proceeding in a court of competent jurisdiction in Hamilton county, Ohio, was placed in the hands of a receiver, by virtue of which the equity that said corporation had in said policy by virtue of the assignment first above mentioned, passed to the receiver, and said receiver procured an order of the proper court in said county to join in the prosecution of this action.

Upon the issues joined, involving the substantial facts as above stated, the case was tried by a jury, and under the instructions of the court a special verdict was returned in the form of answers to interrogatories. The verdict of the jury was returned November 14, 1894, being the sixty-fourth judicial day of the September term, 1894, of the Delaware Circuit Court. On the day the verdict was returned the appellant, John DePinal, receiver, moved the court for judgment in his favor on the special verdict for \$473.45, and appellants, Shaffer and Foster, moved for judgment in their favor for \$326.55, and these two motions the court took under advisement. At the next succeeding term of said court, to-wit: on January 6, 1895, the defendant moved the court for judgment in its favor on the special verdict, and on the last named date the court overruled the motion of appellant, DePinal, receiver, and also the motion of the appellants, Shaffer and Foster, for judgment in their favor on the special verdict. To which ruling they each excepted. And the

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court sustained appellee's motion for judgment in its favor, to which ruling the appellants also excepted. On the same day the appellants moved the court, in writing, for a new trial; which was overruled, and to which they excepted. Appellee excepted to the filing of the motion for a new trial on the ground that the motion came too late. On appeal, appellants have assigned error as follows:

First. Error of court in overruling appellants' motion for judgment in their favor on the special verdict.

Second. Error of court in sustaining appellee's motion for judgment in its favor on the special verdict.

Third. The court erred in rendering final judgment against appellants for costs upon the special verdict.

Fourth. The court erred in overruling appellants' motion for a new trial.

The fourth assignment of error does not present any question for our decision. It affirmatively appears from the record that the verdict in the court below was returned on November 14, 1894, being the sixty-fourth judicial day of the September term, 1894, of said court. This court judicially knows that November 14, 1894, was not the last day of the September term, 1894, of said court, and hence, as appellants did not file their motion for a new trial during the term at which the cause was tried, and the verdict was not returned on the last day of the term, they waived their right to file a motion for a new trial.

Section 570, Burns' R. S. 1894 (561, Horner's R. S. 1896), provides: "Application for a new trial may be made at any time during the term at which the verdict or decision is rendered; and if the verdict or decision be rendered on the last day of the session of any court, or on the last day of any term, then, on the first day of the next term of such court, whether general, special, or adjourned."

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It was held by this court in *Jacquay v. Hartzell*, 1 Ind. App. 500, that a failure of the court to rule upon a motion for a judgment on the special finding during the trial term will not be cause for making a motion for a new trial at the next term.

Under the plain meaning of the statute and the decisions of the Supreme and Appellate Courts of this State, the appellants in this case waived their right to a motion for a new trial by not filing it during the term at which the cause was tried, it affirmatively appearing from the record that the verdict of the jury was not returned on the last day of the term.

The other assignments of error bring in review the same questions, and may be considered together.

Appellee has interposed a motion to dismiss the appeal, which involves some questions of practice, but from our view of the law in this case we can dispose of the questions involved without passing upon the motion to dismiss and without prejudicing the rights of the appellee under such motion.

There seems to us to be but one question in the case of controlling interest or importance, and that arises under an express condition of the policy of insurance, and that condition is specifically set out and stated in the policy, and is as follows: "This entire policy of insurance, unless otherwise provided by agreement endorsed thereon or added thereto, shall be void * * * if the subject of insurance be personal property and be or become incumbered by a chattel mortgage."

The special verdict is very lengthy, and contains much unnecessary, irrelevant, and redundant matter, and we deem it only necessary to refer to those parts or portions of the verdict that are pertinent to the question under consideration. In their answers to interrogatories the jury found and stated, in brief, the

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following facts: That Clayton B. Templer, of Muncie, Indiana, was the agent of appellee and authorized to solicit insurance, countersign policies and collect premiums; that he had in his employ one Richman as clerk, who was authorized to sign the name of his employer to policies, solicit insurance, collect premiums, and issue and countersign policies; that on March 21, 1893, appellant, Shaffer, went to the office of said Templer, who was a lawyer and notary public, with a chattel mortgage, filled out, except as to one or two blanks, covering the property that was afterwards embraced in the policy of insurance sued upon; that said chattel mortgage was payable to The Schmidtt & Brother Company, of Cincinnati, Ohio; that at the request of said Shaffer he, Templer, filled the blanks and took the acknowledgment of said mortgage; that said mortgage was duly filed for record in the recorder's office of said county on that day, and that the mortgagors resided in said county; that when said Templer took said acknowledgment he did not know what property was described or embraced therein; that on March 23, 1893, two days after said mortgage was executed and recorded, said Richman went to the place of business of Shaffer and Foster and took their application and issued to them the policy in suit, which covered the property embraced in said mortgage and a certain stock of liquors; that at the time said policy was issued neither said Richman nor said Templer knew that the property described in the policy was incumbered by chattel mortgage, and that said Templer did not learn of said facts for about thirty days thereafter; that said Shaffer and Foster paid as a premium for said insurance \$16.00, and that all the property described in said policy was totally destroyed by fire September 13, 1894; that on December 21, 1894, the

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appellants, Shaffer and Foster, gave notice to the appellee of the loss, and made proof thereof.

The verdict further states all the facts in regard to the assignment of the policy by Shaffer and Foster to The Schmidtt & Brother Company and the reassignment to them, and that there is due appellant, DePinal, receiver, upon said policy, \$473.45, and to the appellants, Shaffer and Foster, \$326.55. Upon these facts appellants contend that they are entitled to recover the entire amount of the policy in proportion to the respective interests that each have therein, as found and determined by the jury.

Unless the condition in the policy above quoted, when applied to the facts as found by the jury, avoids the policy, the appellants were entitled to recover, and the court should have sustained their respective motions for judgment in their favor.

Appellants earnestly urge that the notice to the agent, Templer, under the facts as stated by the jury, was notice to the appellee; and, having issued the policy under such conditions, and accepted the premium therefor, and not offering to cancel the policy and return the unearned premium, the appellee can not escape liability. It will be observed, from the facts above stated, that the jury found that the said C. B. Templer was an attorney and notary public; that he was also attorney for appellant, Shaffer; that he was familiar with his business, and that he was his attorney in procuring for him his license to sell intoxicating liquors, and that he took the acknowledgment of the mortgage of the appellants, Shaffer and Foster, to The Schmidtt & Brother Company.

The appellants earnestly contend that all these facts should be considered as to the question of knowledge of the appellee of the fact of the existence of the mortgage at the time of the issuing of the policy. We

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cannot see the relevancy or materiality of these facts. They do not show or tend to show knowledge on the part of the appellee. When an agent is acting within the scope of his agency or authority, the great weight of the adjudicated cases hold that his knowledge is the knowledge of his principal, and that the principal is bound by his acts; but this rule does not obtain when the agent acts for himself and wholly independent of the business or employment of his principal. A person may be the authorized agent of an insurance company and at the same time be a lawyer or notary public, and his professional acts in either of the latter capacities, not pertaining to the business of his principal, cannot be said to be notice to the principal or binding upon him. We are not without high authority in support of this proposition.

In the case of the *Union Nat. Bank of Oshkosh v. German Ins. Co.*, 71 Fed. 473, 18 C. C. A. 203, the United States Circuit Court of Appeals, where the appellee sought to avoid its liability upon a policy issued by it, where the breach alleged was a violation of a stipulation in the policy prohibiting over-insurance, it was held that where an agent's knowledge of outstanding over-insurance is acquired by virtue of his relation as attorney for the insured, and in a transaction with which the company was not connected, his knowledge is not the knowledge of the insurance company so as to effect estoppel or a waiver. See, also, *Trentor v. Pothén*, 46 Minn. 298, 49 N. W. 129; *St. Paul, etc., Insurance Co. v. Parsons*, 47 Minn. 352, 50 N. W. 240.

Appellants further insist that the fact that the mortgage was duly recorded was notice to the appellee, and having issued the policy and accepted the premium thereon with such constructive notice, the condition of the policy relating to incumbrance by

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mortgage was waived. We concede that the general rule prevails that where the law requires an instrument under seal to be recorded in a public record that such record is notice to all the world, but the rule is not applicable here. Insurance companies that issue policies of insurance with express conditions that the policy shall be void if at the time the property is or shall become incumbered by mortgage, etc., are not required to examine public records to see whether or not the insured is violating a stipulation in the policy, under and by which he must be bound.

A policy of insurance is a contract between the insurer and the insured, and the law presumes that the insured accepts the policy with a full knowledge of all its stipulations. Where, therefore, the insured accepts his policy, which is his contract, with the knowledge of all of its conditions and stipulations, and at the time of his acceptance he takes it with the knowledge of a breach on his part, and in the absence of knowledge on the part of the insurer, he cannot afterwards be heard to complain.

In support of the proposition that the insured is chargeable with notice of the contents and conditions and stipulations of his policy, we cite the following cases: *Morrison v. Insurance Co.*, 69 Tex. 353, 5 Am. St. 63, 6 S. W. 605; *Cleaver v. Traders' Ins. Co.*, 71 Mich. 414, 15 Am. St. 275, 39 N. W. 571.

- A public record of a chattel mortgage is not notice to an insurance company, and the issuing of a policy conditioned that it shall be void if the property insured be or shall become incumbered by chattel mortgage, such insurance company does not waive such condition by reason of the fact that such mortgage has been duly recorded.

The fact that a mortgage executed on insured property is recorded as required by law, does not consti-

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tute notice thereof to the insurer. To bind the company issuing a policy under such conditions, it must have actual notice of the existence of the mortgage at the time the policy is issued, or notice of such facts as will put it upon inquiry. *U. S. Ins. Co. v. Morarity* (Tex. Civ. App.), 36 S. W. 943; *Morotock Insurance Co. v. Pankey*, 91 Va. 259, 21 S. E. 487; *First Nat. Bank v. American, etc., Insurance Co.*, 58 Minn. 492, 60 N. W. 345; *Anderson v. Manchester, etc., Assurance Co.*, 59 Minn. 182, 60 N. W. 1095, 63 N. W. 241, 28 L. R. A. 609; *Rochester, etc., Co. v. Liberty Insurance Co.*, 44 Neb. 537, 62 N. W. 877.

In line with the cases just cited, it has been held by the supreme court of Iowa that recording a mortgage on insured property is not such constructive notice to the insurer as to make its subsequent acceptance of premiums from the mortgagor a waiver of conditions in the policy prohibiting mortgaging the insured property without the consent of the insurer. *Wicke v. Iowa, etc., Ins. Co.*, 90 Ia. 4, 57 N. W. 632.

The court of appeals of Colorado, in the case of *Fireman's Fund Ins. Co. v. Barker*, 6 Colo. App. 535, 41 Pac. 513, holds, that a fire policy, conditioned to be void if the insured has concealed any material fact, or if his interest be other than unconditional and sole ownership, is void, if the fact that there was a recorded mortgage on the property was not mentioned, though the concealment was not fraudulent.

There is no question of concealment in the case under consideration, but the principle announced in the case last cited is applicable to the facts here. The courts, almost without exception, hold that insurance companies may rightfully insert in their policies, and enforce against the holders, as a defense, conditions similar to those contained in the policy sued upon.

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This rule cannot, under the current of authorities, be successfully contradicted. The courts of our own State have so held in numerous cases. *Bowlus v. Phenix Ins. Co.*, 133 Ind. 106, 20 L. R. A. 400; *Continental Ins. Co. v. Vanlue*, 126, Ind. 410, 10 L. R. A. 843; *Continental Ins. Co. v. Kyle*, 124 Ind. 132, 9 L. R. A. 81; *Geiss v. Franklin Ins. Co.*, 123 Ind. 172; *Milwaukee, etc., Co. v. Niewedde*, 12 Ind. App. 145.

In the case of *Havens v. Home Ins. Co.*, 111 Ind. 90, the court, speaking by Mitchell, J., said: "Courts can not by construction compel insurance companies to assume obligations which they have fairly guarded against, in order to protect themselves against imposition, so that their solvency may be legitimately preserved, in order to afford indemnity to policy holders who observe their contracts."

Under the great weight of authorities we must hold that the existence of the mortgage given by Shaffer and Foster to The Schmitt & Brother Company, which mortgage was an existing lien on the property embraced in the policy at the time of its issuance, was a breach of the conditions of the policy, and that as the appellee had no knowledge of its existence at the time the policy was issued, such breach voided the policy, and that appellants were not entitled to recover thereunder.

Judgment affirmed.

THE CHICAGO AND ERIE RAILROAD COMPANY
v. LEE, ADMINISTRATOR.

[No. 2,095. Filed March 12, 1897.]

RAILROADS.—Defective Roadbed.—Complaint.—A complaint against a railroad company seeking to recover for the death of an employe caused by the negligence of the company in maintaining its track and roadbed in an unsafe condition, must aver that deceased was ignorant of the unsafe condition of the roadbed. *p. 218.*

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SAME.—*Negligence.—Knowledge of Defective Roadbed.—Complaint.*

In an action against a railroad company for the death of an employe caused by the negligence of the company in permitting signal wires to remain across the track, unboxed, between which wires the foot of intestate became fastened while he was in the act of making a coupling, a complaint alleging that "the wires were so small and so near the ground that they were not perceived by decedent before he was caught thereby, and that he was ignorant of the danger, and that it was not to him apparent," does not sufficiently aver a want of knowledge of the defect. pp. 218, 219.

EVIDENCE.—*Opinion of Witness as to How Accident Occurred.—Demonstration in Presence of Jury.*—The statement of a witness of how he at some other time had concluded that an accident must have happened, accompanied by a demonstration in the presence of the jury is not admissible. pp. 220-222.

SAME.—*Repairs Made After Injury.*—Evidence of repairs made after the injury is not admissible to show prior negligence. pp. 222-224.

From the Huntington Circuit Court. *Reversed.*

W. O. Johnson and Kenner & Lesh, for appellant.

J. C. Branyan, J. S. Branyan, W. H. Hart and J. J. Hart, for appellee.

ROBINSON, J.—Appellee, as administrator of the estate of one Sloan, brought this action to recover damages for the death of said Sloan, caused by the negligence of appellant. A demurrer to the complaint was overruled and the cause put at issue by the general denial. Appellant moved for judgment in its favor upon the special verdict, which was overruled, as was its motion for a *venire de novo*. Upon motion, judgment was rendered upon the special verdict in favor of appellee, after which appellant's motion for a new trial was overruled.

The complaint is in one paragraph and alleges, in substance, that on the day of the accident the decedent was in the employ of appellant as a brakeman; that on said day, while in his line of duty, while attempting to make a change of link in one of the cars,

preparatory to making a coupling of the cars, his foot was caught between one of the ties on said road and two wires running parallel with and close thereto, which wires are sometimes called signal wires, and were there placed by appellant, running from the interlocking switch to the tower house or to the home semaphore; that the wires were used by appellant as an appliance in making switches or switching its trains; that decedent's foot being so caught in said wires and held fast so that it was impossible for him to extricate the same, and the train being moved backward, threw him upon the track and the cars passed over his body, killing him instantly; that the appellant was "guilty of negligence in this: that it allowed said wires for two weeks after the same had been there placed, running under the rails of its road and parallel with the ties, to remain unboxed or uncovered, and liable at any time to trip or catch its employes and hold them fast until the train there moving would crush them; plaintiff further avers that the defendant and its superior officers well knew that the same was a dangerous appliance, and that the wires being so small and so near the ground, that they were not perceived by decedent before he was caught thereby, and that he was ignorant of the danger, and it was not to him apparent, and that he was, in all that he did in the premises, wholly free from fault, and that his death resulted from the negligence and carelessness of the defendant in not providing for the boxing and covering of said wires." It is further averred that the decedent, at the time of his death, was twenty-two years old, of vigorous health, of temperate and industrious habits, capable of earning \$65.00 per month, and was in line of promotion where he could earn from \$100.00 to \$125.00 per month; that

plaintiff was duly appointed administrator, and that decedent left as his only heir, his widow.

We have set out, in the words of the complaint, all the allegations it contains on the question of the negligence of appellant, and freedom from fault on the part of the decedent.

It is earnestly argued, and at great length, that these allegations do not show that the decedent was without fault and that appellant was guilty of negligence, but that the complaint discloses contributory negligence on decedent's part.

Much of appellant's brief on the demurrer to the complaint is directed to a defect in the complaint as it originally appeared in the transcript, but which was afterwards corrected by a writ of *certiorari*.

The complaint seeks to recover for the death of an employe caused by the negligence of the appellant in maintaining its track and roadbed in an unsafe condition, and it must aver that the decedent was ignorant of the unsafe condition of the roadbed. In such a case, the usual allegation that the decedent was free from fault is, in itself, insufficient. If the decedent had notice of the defect or dangerous condition of the track at that place, and voluntarily continued in the service, he assumed the increased risk and waived any claim upon the employer for damages. *Louisville, etc., R. W. Co. v. Sandford*, 117 Ind. 265.

It is argued by appellant's counsel that the allegations of the complaint do not show that the decedent had no knowledge of the defect; while counsel for appellee contend that the allegations "that the wires were so small and so near the ground that they were not perceived by the decedent before he was caught thereby, and that he was ignorant of the danger, and it was not to him apparent," are equivalent to saying

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that the decedent had no knowledge of the defect in the roadbed when injured.

Applying the rule that a pleading must be construed most strongly against the pleader, we are inclined to believe the complaint is insufficient. It is not clear whether the pleader intends to say that the decedent was ignorant of the danger of going in front of a moving car, near a defect in the track, to arrange for a coupling, or whether he intended to say that the defect itself was a dangerous place, and that he had no knowledge of such danger. Appellee's right to recover rested upon the fact that the decedent did not know of the defective and dangerous condition of the roadbed at that particular place, at the time he was killed. He might have known that the defect existed and still have been ignorant of any danger in attempting to make a coupling as the train passed over it. We think that upon this very essential element in appellee's cause of action the complaint should be free from any ambiguity.

It is true that the employer is not an insurer of the employe's safety, nor is he bound to furnish a place that is absolutely safe, but he is required to use reasonable care, skill, and diligence, and to provide a reasonably safe place for his employes to work. *Louisville, etc., R. W. Co. v. Corps*, 124 Ind. 427, 8 L. R. A. 636; *Lake Shore, etc., R. W. Co. v. Stupak*, 123 Ind. 210; *Taylor, v. Evansville, etc., R. R. Co.*, 121 Ind. 124, 6 L. R. A. 584; *Evansville, etc., R. R. Co. v. Duel*, 134 Ind. 156; *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212; *Krueger v. Louisville, etc., R. W. Co.*, 111 Ind. 51; *Louisville, etc., R. W. Co. v. Buck*, 116 Ind. 566, 2 L. R. A. 520; *Cincinnati, etc., R. W. Co. v. Lang*, 118 Ind. 579.

The complaint in an action of this kind must show that the appellant had made such a change in its roadbed as that it was guilty of actionable negligence in

not providing its employes with a reasonably safe place to work; and that the decedent was not only free from any fault which proximately contributed to his death, but, also, that he had no knowledge of the defective and dangerous condition of the roadbed at the time he was killed.

The demurrer to the complaint should have been sustained.

But, if it were conceded that the complaint is sufficient, the cause must be reversed for other errors.

One of the causes assigned for a new trial was the admission of the opinion of the witness, Waymack, as to how the accident happened, allowing the witness to relate the experiment he claimed to have made at the excavation, and permitting him to demonstrate by physical maneuvers, in the presence of the jury, the manner in which, in his opinion, it might have happened.

The appellee based his right to recover in this case upon the fact that the excavation and wires across the roadbed caused the decedent to fall in front of a moving car, which, in consequence, ran over and killed him. He was seen to go in front of the car to arrange the coupling, but no one saw him after that until after the cars had run over him. An employe of appellant, Fred Waymack, was called as a witness by appellee. He testified that decedent "was in the act of placing this link in the drawbar to make the coupling on the rear end of the train, and that was the last I saw of him until I saw a signal from Heavy which warned me that there was something wrong, and when I arrived there, I saw him under the train, killed." He further testified, "The last time I saw him he had reached across to the end sill to get a link off of the end sill of the car, and place it in the drawbar, and then, when he got in there behind, and the cars were

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moving, I failed to see him. Ques. You failed to see him any more? Ans. Yes, sir. Ques. You didn't see the man fall at all, did you? Ans. No, sir. * * * * Ques. Just how he fell, you can't tell anything about it? Ans. No, sir." The witness further said he did not see him step in the trench.

It seems that this witness had demonstrated at the scene of the accident, immediately after it occurred, how the decedent must have fallen, judging from footprints and other marks on the ground; that he got down on the ground and placing his foot in the trench where there was a footprint recently made, he illustrated by movements of his limbs and body how it appeared the accident must have happened. And over an objection and exception by appellant the witness gave the same illustration and demonstration in the presence of the jury.

It is argued that the reproduction in the presence of the jury of this experiment, made at the place of the accident, was simply the opinion of the witness as to how the accident occurred, and that its admission was error. We agree with counsel that the admission of this illustration and experiment was error.

Counsel for appellee, in their brief, offer nothing in support of this ruling, except the following: "this witness [Waymack] had testified that he saw Sloan caught in the wires, fall, and saw him killed, and that immediately he had made an examination in the trench and saw the track and he was asked simply to detail to the jury how it occurred. Had he not been there at the time of the accident and had he come up to the place at a time remote from its happening, the testimony, of course, would be incompetent."

In view of the evidence of the witness himself, that he did not see the decedent step into the trench containing the wires, and did not see him fall, we are un-

able to see how the evidence complained of could be competent. It was an illustration to the jury by the witness of how he had, at a former time, showed to others what his opinion then was as to the nature of the accident, and was equivalent to a statement by the witness of what he had stated out of court as his opinion concerning the accident. The witness could testify to what he actually saw, and as to any footprints or other marks on the ground, and as to measurements made in reference to such footprints and marks; and when these known facts were placed before the jury, it was a question for the jury to say where he did step and how he fell and was killed. We do not think the demonstration complained of falls within the line of demonstrative evidence. It was the duty of the jury to arrive at a conclusion as to how the death actually occurred. The statement of the witness of how he, at some other time, had concluded the accident must have happened, accompanied by the demonstration in the presence of the jury, was improperly admitted. It cannot be said that the admission of such evidence was not prejudicial.

Certain witnesses were permitted, over objection and exception by appellant, to testify that, after the accident, the trench containing the wires was covered.

This evidence was not admissible. It could not have been admissible for the purpose of tending to show that appellant had notice of the defect, for it is not denied that the trench and wires were placed in the roadbed by appellant. It did not tend to show antecedent negligence on appellant's part. Whether there had been a negligent discharge of duty on appellant's part must be determined from what appellant did, or neglected to do, prior to the accident, and not what was done afterwards. The only effect such evidence could possibly have, would be an admission

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of previous neglect of duty. If the making of subsequent repairs is to be construed as an admission of prior negligence, the law would then virtually hold out an inducement for continued negligence.

In reversing the case of *Terre Haute, etc., R. R. Co. v. Clem*, 123 Ind. 15, because of the admission of such evidence, the court said: "To declare the evidence competent is to offer an inducement to omit the use of such care as the new information may suggest, and to deter persons from doing what the new experience informs them may be done to prevent the possibility of future accidents. The effect of declaring such evidence competent is to inform a defendant that if he makes changes or repairs, he does it under penalty; for, if the evidence is competent, it operates as a confession that he was guilty of a prior wrong. * * * It is unjustly reversing the presumptions to hold that such an owner improves, or repairs, because he was, at some time anterior to the time of making the improvements or repair, guilty of an actionable wrong. True policy and sound reason require that men should be encouraged to improve, or repair, and not be deterred from it by the fear that if they do so their acts will be construed into an admission that they had been wrongdoers. A rule which so operates as to deter men from profiting by experience, and availing themselves of new information has nothing to recommend it, for it is neither expedient nor just." *Board, etc., v. Pearson*, 129 Ind. 456; *Nalley v. Hartford Carpet Co.*, 51 Conn. 524; *Dale v. Delaware, etc., R. W. Co.*, 73 N. Y. 468; *Hudson v. Chicago, etc., R. W. Co.*, 59 Ia. 581, 13 N.W. 735; *Morse v. Minneapolis, etc., R. W. Co.*, 30 Minn. 465, 16 N.W. 358.

The court erred in overruling appellant's motion to strike out the evidence of repairs made subsequent to the time of the accident.

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Counsel for appellant have argued other alleged errors based upon the special verdict. An essential part of the verdict must necessarily be a finding by the jury upon facts which were inquired about in this inadmissible evidence. What weight that evidence may have had with the jury in their deliberations upon the verdict, or whether it had any weight, cannot be determined. If a part of the evidence which went to the jury upon the material issues in the case was inadmissible, it is not necessary for us to inquire into the sufficiency or insufficiency of the special verdict which was based upon all the evidence given in the cause.

We cannot say that the admission of this evidence was harmless error, nor can we say that it did not influence the jury.

Judgment reversed, with instructions to sustain the demurrer to the complaint.

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[No. 2,125. Filed March 12. 1897.]

NEW TRIAL.—*Sufficiency of Affidavit in Support of Motion When Party Claims to Have Been Misled by Court as to Time of Trial.*—A motion for a new trial on the ground that defendant was misled by the statement of the court that the cause would be continued indefinitely, is properly overruled, where the affidavits in support of the motion do not show that a motion for a continuance was made, and that the defendant had a good and meritorious defense to the action.

From the Vigo Circuit Court. *Affirmed.*

M. C. Hamill, for appellant.

P. M. Foley and *I. Torner*, for appellee.

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HENLEY, J.—The only error assigned by appellant herein is the alleged error of the lower court in overruling appellant's motion for a new trial. The motion for a new trial is based solely upon the fact, as contended by appellant, that the court misled appellant and appellant's counsel as to when this cause would be tried. In support of the motion and as a part of the same, were filed the affidavits of counsel for appellant and the affidavit of appellant's agent, William T. Jones, stating therein the following facts and circumstances, viz.: That on the —— day of January, 1896, the cause was set for trial in the Vigo Circuit Court, at which time said Jones appeared, representing the defendant, and together with his attorneys, was present and ready for trial; that at said time another cause was on trial and being heard by the court, and the court informed affiant that this cause would be tried the next day; that affiant was present with his counsel on the next day, but on account of the same cause, as before stated, the court said that this cause would be continued until the following day; that on the following, or the next day thereafter, appellant and counsel, finding the court yet engaged in the trial of other causes, went to the court and informed the court that affiant had business for the following day, and that appellant's counsel, Mr. Beecher, told the court that he had a cause set for trial at Sullivan on the —— day of January, and that he had arranged to leave on the following afternoon to consult about the case, and it was impossible for him to get ready for the trial, and that the court then said to affiant that he would continue and pass the case indefinitely; that relying on the statement of the court, affiant instructed the witnesses to go, and he would notify them when they were wanted; that said conversation oc-

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curred about 9 o'clock a. m., and that about the hour of 3 o'clock p. m. affiant received notice to appear before the judge at the court house; that the judge then informed affiant that this cause would be tried. Affiant then, through appellant's counsel, who were present, informed the court that relying on the statements of the court made in the morning, important business engagements had been made for the following day, and the court informed affiant that unless they would agree to try the cause the following day he would order the same tried at once. That affiant, through the counsel for appellant, informed the court that it would be impossible for him to make arrangements to be present the following day. That the court ordered the cause to be tried, which was done, the evidence of appellee heard and the jury returned a verdict for appellee; that relying on the statements of the court, appellant's evidence was not before the jury.

The other affidavits are substantially the same and we set out the substance of the affidavit of the man Jones, because it is admitted that he was the agent for appellant and was at the time acting for appellant in the matter.

It will be observed that the affidavit of appellant's agent nowhere states that appellant had a valid defense to this action; that it wholly fails to point out to the court any defense that appellant might have made if the motion for a new trial had been sustained. It also shows that at the time of the trial appellant was, by her agent and attorneys, in the court room, and it nowhere shows that the court refused or prevented the appellant filing a motion and affidavit for a continuance.

In these important particulars this cause differs materially from the case of *Edsall v. Ayres*, 15 Ind. 286.

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Applications for new trials are always addressed to the sound discretion of the court before whom the cause was tried, and its decision will be presumed to be correct and in accordance with the justice and merits of the case, unless in the exercise of such discretionary power the court has plainly committed an error prejudicial to the rights of the complaining party.

It would seem to us that the affidavit of appellant's agent in support of the motion for a new trial, under the circumstances stated in the affidavit, ought to have informed the court not only that appellant had a good and meritorious defense to this action, but it should have set out specifically what the defense was, so that the court might determine whether any good would come from a retrial of the cause.

If we treat the judgment in this cause as a judgment by default, with appellant and counsel not present at the time it was taken, still in a motion to set aside such default counsel for appellant would not contend that such motion would be sufficient unless it contained the specific statement of a valid defense. The record in this cause shows a trial and verdict by a jury. To set this verdict aside, appellant's counsel cannot contend that less would be required of them than would be required in the setting aside of a default.

We find no error in the record.

Judgment affirmed.

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[No. 2,118. Filed March 16, 1897.]

AGENCY.—*Liability of Agent for Act of Sub-Agent.—Fraud.—Statute of Limitations.*—B, a general loan agent, had an agreement with a local loan agency by which such local agency was to receive applications for loans and forward same to B, and in the event that a loan was thus made the commission paid was to be shared by both. Through the local agency, A made application for a loan which in pursuance of the agreement was procured by B, the general agent, and a draft for the money, payable to A, was forwarded to the local agents with instructions to see that all liens and incumbrances were paid that were on the land offered for security, and to complete the loan. The local agents notified A that it was necessary for him to endorse the draft to them that they might pay off a certain school fund mortgage, and the endorsement was made. One of the local agents who was also county auditor, fraudulently delivered up the school fund note and mortgage, fully receipted and satisfied, but the school fund lien was not in fact paid, but the amount thereof retained by the local agents. Afterwards the school fund mortgage was enforced against A. *Held*, that A had a cause of action against B for the recovery of the money. *Held*, also, that the acts of the auditor amounted to a fraudulent concealment, and the statute of limitations did not begin to run against A, the mortgagor, until knowledge came to him of the fact that said mortgage had not been paid.

From the Daviess Circuit Court. *Affirmed.*

W. R. Gardiner, C. G. Gardiner and W. R. Gardiner, Jr., for appellant.

Arnold J. Padgett, Alvin Padgett and J. W. Ogden, for appellees.

COMSTOCK, C. J.—Trial by the court and judgment below in favor of appellee. The errors assigned are that the court erred in overruling appellant's demurrer to the complaint, in overruling motion for a continuance, and overruling motion for a new trial.

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The complaint is assailed upon two grounds. First, that it does not state facts sufficient to constitute a cause of action; second, that it shows upon its face that the cause of action is barred by the six years' statute of limitations.

The complaint avers, in substance, that in the year 1888, Thomas C. Day and William C. Griffith were, under the firm name of Thomas C. Day & Company, engaged in the business of loaning money, having their principal place of business at Indianapolis, Indiana; that they were general agents in the State of Indiana for loaning money of the Aetna Life Insurance Company; that Lavelle & Clark were also engaged in the business of loaning money, and their place of business was Washington, Indiana; that Day & Company and Lavelle & Clark had an agreement with each other by which Lavelle & Clark were to procure customers and contracts for Day & Company as agents, to obtain loans for such customers, and divide with each other the commissions obtained therefrom; that appellee, Dages, applied to Lavelle & Clark for a loan; that Lavelle & Clark, in pursuance of the agreement made with Day & Company, procured him to sign a contract, employing Day & Company as his agents to procure for him a loan, agreeing to pay them a certain commission for their services, which agreement was, by Lavelle & Clark, forwarded to Day & Company, who accepted the same and thereupon, as the agents of appellee, Day & Company procured for him a loan of \$750.00; that by the terms of the agreement between Day & Company and Lavelle & Clark, Day & Company were to procure the loan, forward the same to Lavelle & Clark, who would then attend to the closing of the loan; that Day & Company procured the loan for appellee, sent the money by draft to Lavelle & Clark, payable to appellee, together with the

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notes and mortgage for the plaintiff to execute, and with instructions to Lavelle & Clark to see that all liens and incumbrances were paid that were then on the land offered as security, so that the lien of the mortgage to the Aetna Life Insurance Company would be the first lien; that Lavelle & Clark received the papers and draft from Day and Griffith and notified appellee that it was necessary for him to endorse the draft to them so that they might procure the money to pay off liens, among which was a school fund mortgage upon which there was then due a balance of \$92.25; that appellee thereupon endorsed the draft as required, and Lavelle & Clark drew the money thereon; that Lavelle was at that time the auditor of Daviess county, Indiana, in which county the land mortgaged was situated; that Lavelle & Clark proceeded to close up said loan and pay off the liens on the land; that Lavelle, as the auditor of the county, turned over to the appellee, Dages, the school fund note and mortgage, fully receipted and "satisfied;" that appellee believed that the same had been paid and properly satisfied, and that he did not know any different until the — day of —, 1894, when the then auditor of Daviess county brought suit upon the same; that upon the trial of said suit it was shown that the money had never, in fact, reached the treasurer of the county, and a judgment was rendered against him for said balance and interest; that Lavelle & Clark and Day and Griffith never paid the money due on said school fund mortgage to the treasurer of the county, but that they unlawfully converted the same to their own use; that at the October term, 1894, of the Daviess Circuit Court, the auditor of said county recovered judgment against the appellee for the sum of \$140.52; that since then he has made a demand on the said Lavelle & Clark and the said Day

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and Griffith for the payment of said money and interest, which they refused to pay; that Griffith is dead and his estate settled; Lavelle & Clark made default.

These averments are to the effect that at the instance of Lavelle & Clark, appellee applied to Day & Company to procure for him a loan. They procured the money, sent it by draft in his name to Lavelle & Clark, and directed them to see that it was applied to the payment of all liens and incumbrances then on the real estate of the appellee, so that the mortgage to be given to the Aetna Life Insurance Company should be the first lien; they, Lavelle & Clark, procured the draft to be endorsed to them for this purpose; they received the money thereon and engaged to do what Day & Company had instructed them to do, and for which services, in connection with other services to be rendered in and about the making of said loan, they were to receive from Day & Company 2 per cent. of the 5 per cent. commission agreed to and actually paid by appellee to Day & Company.

It is clear that in this transaction they were acting as the representatives of Day & Company; instructions were given them by Day & Company to do certain things in the interest of their principal, the Aetna Life Insurance Company; at their instance they procured the money from appellee, agreeing to apply it in the discharge of liens that the Aetna Life Insurance Company might be secure in its investment. We think appellant should not be heard to say that Lavelle & Clark were not acting for them and thus escape responsibility for the bad faith of one whom they had intrusted with their business. *Dodds v. Vannoy, Admr.*, 61 Ind. 89.

The mortgage and notes given by appellee to secure the school fund, having been surrendered to him, marked "satisfied," by the representative of the ap-

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pellant, which representative was, at the time, auditor of said county, and the proper officer to cancel said mortgage upon the payment of the debt to secure which it had been given, and who, under the direction of appellant, had received from appellee the money with which to pay said indebtedness, was a fraud amounting to concealment upon the part of said representative, and the statute of limitations would not begin to run against said mortgagor until knowledge came to him of the fact that said mortgage had not been paid. *Boyd v. Boyd*, 27 Ind. 429; *Dorsey Machine Company v. McCaffrey*, 139 Ind. 545, and the authorities therein cited.

It was not negligence upon his part to rely upon the truth of the endorsement of the proper officer to whom he had actually paid the money. The demurrer to the complaint was properly overruled. Its allegations are amply sustained by the evidence.

Appellant insists that the court erred in overruling his motion for a continuance of the cause when appellee had rested his case. Appellant moved for a continuance of the cause because of surprise at the testimony of appellee and one August Farrel, as to the presence and participation of the appellant and one John E. Springer in the paying out of the money on the liens against appellee's land; to which ruling proper exception was taken, and which is assigned as error in this appeal.

We think in this ruling of the court there was no error. The presence of the appellant at that time would not change the liability of appellant under the averments of the complaint, or under the evidence adduced at the trial.

Judgment affirmed.

VALPARAISO CITY WATER COMPANY v. DICKOVER.

[No. 1,887. Filed March 16, 1897.]

WATERS.—*Diversion of Water from Lake by Water Company.*—The diversion of water from a lake by a water works company in supplying a city with water is an extraordinary use of the water which can only be exercised reasonably and with proper regard for the rights of others.

SAME.—*Diverting Water from Lake by Water Company.*—*Liability to Riparian Owner.*—Where water works erected at the margin of a lake for the purpose of supplying a city with water results in a perceptible diminution of the water opposite the lands of another riparian owner to his injury during dry seasons, an action will lie against the water company for the damages accrued to the date of the commencement of the action.

LIMITATION OF ACTION.—*Special Damages for Diversion of Water.*—In an action for an unreasonable diversion of the water of a lake at certain seasons, the statute of limitation runs from the occurrence of the special damages for which complaint is made.

SAME.—*Liability for Unreasonable Diversion of Water from Lake.*—*Measure of Damages.*—In an action by a riparian owner against a water company for an unreasonable diversion of water from a lake, the measure of damages is the difference in the rental value of the property injured.

From the Porter Circuit Court. *Affirmed.*

A. D. Bartholomew and A. L. Jones, for appellant.

E. D. Crumpacker, Grant Crumpacker and William Johnston, for appellee.

BLACK, J.—In this action the appellee recovered a judgment for damages against the appellant for alleged wrongful diversion of the water of a small lake known as Flint Lake, in Porter county.

The facts upon which the material questions to be decided depend may be briefly stated, in substance, as follows:

At the commencement of the action, in December,

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1894, the appellee was, and since June, 1890, had been, the owner in fee simple and in possession of a tract of land on which, in part, and running to within 500 feet of the north line thereof, said lake is situated, being a clear water lake, a natural, permanent body of water, covering about one hundred and sixty acres. Said lake is connected by a channel with Long Lake, a smaller body of clear water, and had an outlet through which, formerly, the surplus water flowed off. In 1885, said real estate was owned in fee simple and in possession of Joseph, James, Alvah and John Leonard. In 1887, said Joseph, James and Alvah Leonard conveyed their title and interest in said land to said John Leonard, who then took possession and occupied the land till June, 1890, when he conveyed the land in fee simple to the appellee, who, prior to that time, had no property or interest in said land and did not own any land bordering on or connected with Flint Lake.

In February, 1885, the City of Valparaiso, which is about three miles south of Flint Lake, by ordinance, authorized the construction and maintenance of a system of water works to supply said city and its inhabitants with water, to be obtained from said Flint Lake, and granted to George P. Smith, Micaiah Walker and Don. A. Salyer, and their successors and assigns, the right to lay pipes along and through the streets and public grounds of said city, build and maintain a system of water-works and supply the city with water for fifty years; said water-works machinery and pipes to have a capacity of one million gallons of water for every twenty-four hours, such capacity to be increased as the growth and needs of the city might require.

Afterward, the appellant was incorporated under the laws of this State, as a company, for the purpose of

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constructing, maintaining and operating said system of water-works; and the rights and privileges so granted were assigned to the appellant. Thereupon, the appellant constructed said system and bought a tract of land bordering on Flint Lake and built thereon pumping works at the east side of the lake, nearly one-half mile from appellee's said land, and laid twelve-inch water pipes from the lake to the city.

On the 1st of January, 1886, the appellant commenced to pump water from the lake and to supply the city and its people with water under said ordinance, and continued so to do to the commencement of this action. At the time when it so began to pump water at its said water-works, said land, which was on the north side of the lake, and then owned by the Leonards, was wild and uncultivated and covered with timber and was used for grazing and stock purposes only. The appellee purchased the land for the purpose of making it a popular summer resort and erected structures and made improvements upon it for such purpose, and so used it, and the business so carried on by him there became and was very profitable to him. For the last two years before the commencement of this action, and, especially, for the last preceding year, the appellant had pumped the water out of the lake, without any leave or license from the appellee, in such quantity that it had caused the water to be lowered so that it disappeared from the appellee's wide, sandy, sloping beach, and receded to deep water beyond the muck line and rendered the appellee's land less valuable for the purpose for which he so used it.

When the appellee purchased said land, the appellant's works had been so in operation a number of years, of which the appellee had knowledge. While the Leonards owned the land they resided in Valpa-

raiso and had their dwellings there connected with said water-works, and used the water so supplied.

It appears that the supply of water from said lake was sufficient to meet all the demands upon it, made by the operation of appellant's water-works, without perceptible and material diminution of the height of the water at its natural stage until after the appellee's purchase and improvement of said land; but thereafter the pumping of the water, together with the dryness of the seasons, caused the level of the lake to fall perceptibly and considerably, and the pumping caused it to fall much lower than it was caused to fall by the dryness of the season. It appeared that the use of the water by the appellant had, of itself, no material and sensible effect upon the level of the water until within three years before the commencement of the action.

The complaint demanded damages in a sum stated, and also prayed for an injunction; but the court treated the cause, and caused it to proceed upon the theory that it was an action at law, for damages alone; and upon trial by jury a verdict for the appellee for damages in the sum of \$150.00 was returned. The theory upon which the case proceeded in the court below follows it to this court.

It is contended on behalf of the appellant, that, the water-works plant being a permanent, useful, necessary and authorized improvement for the purpose of supplying the city with water, and there not being any charge of negligence in the construction or use thereof, it could not be regarded as a nuisance, and the appellee, if the proper person, could recover damages past, present, and prospective; but that there could be but one action for damages in such case, in which the measure of damages should be the difference between the market value of the land before and

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after the injury; that the theory upon which the cause was tried, being that the appellee could recover only such damages as had accrued at the commencement of the action, was wrong, and that the measure of damages adopted by the trial court, in admitting evidence and in instructing the jury, being the difference in the rental value of the appellee's premises for the two years preceding the commencement of the action, caused by the diversion of the water of the lake by the appellant, was erroneous.

It is also contended by the learned counsel for the appellant, that the appellee is not the party injured by the infringement of riparian rights; that the cause of action accrued at the time when the appellant erected its water-works and commenced to pump water from the lake; that all the damages that would accrue could have been ascertained at such time; that the persons then owning the land were the ones who were damaged and the proper persons to bring the action for damages, and the appellee, having purchased after the injury had been done, with full notice, had no cause of action; and that if any cause of action ever did exist, it was barred by the statute of limitations, as not having accrued within six years before the commencement of the action.

Each riparian proprietor is entitled to a reasonable use of water for purposes not domestic. The question whether the quantity which he is diverting is reasonable is not to be determined, in a case like this, by the requirements of his business, but rather by determining whether his use is reasonable and apportionate with reference to the quantity of water usually in the stream or body of water, and whether the complaining riparian owner is substantially damaged by being deprived of his reasonable use. If the business require and use more water than can be permanently

diverted without injury to the right of another riparian proprietor, he has a cause of action. The necessities of one proprietor's business cannot be taken as the standard of another's rights in the water which both have a right to use to a reasonable extent.

In determining the use that may be made of water by a riparian owner, reference must be had, therefore, to the quantity of water in the stream or lake. If there is not more than is necessary to supply the primary, or ordinary wants for domestic purposes, no one can use the water for any secondary, or extraordinary, purposes.

If the company owning water-works, lawfully constructed, operates them in an unreasonable manner, it will be liable for the damages resulting from such unreasonable use.

The diversion of water by such a company is an extraordinary use, which can only be exercised reasonably and with proper regard for the rights of other proprietors. If it does no perceptible damage to other riparian owners, no substantial damages can be recovered; but if by an unreasonable use others are deprived of the reasonable use, an action will lie for such damages.

The use by the upper proprietor must be reasonable, *Dilling v. Murray*, 6 Ind. 324; and the lower proprietor is entitled to the natural flow, without diminution to his injury. *Mitchell v. Parks*, 26 Ind. 354.

A riparian proprietor has not the right to divert the stream permanently from its natural course, and thus deprive others of their rights therein; and the purpose for which the water diverted may be used (as, to supply a neighboring town with water) makes no difference as to the force and effect of this rule. *Rigney v. Tacoma Light & Water Co.*, 9 Wash. 576, 26 L. R. A. 425, 38 Pac. 147.

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In that case it is stated that the legal remedy of the party injured by the diversion would be confined to past injuries.

In Gould on Waters, section 214, it is said, that "by the weight of authority, neither an upper or lower proprietor can maintain an action for the diversion; the raising or the detention of water by a neighbor upon the stream, which, being reasonable in mode and degree, is not the cause of actual perceptible damage. Under this rule, as no right of action accrues until injury is inflicted, no prescription begins to run until that time."

It does not appear that there had been an unreasonable use prior to the purchase and improvement of the land by the appellee.

The parties each owned land bordering on the lake. The appellant diverted the water for the purpose of supplying the city by means of water-works, the diversion resulting in a sensible diminution of the water opposite the land of the appellee in dry seasons, so that thereby the appellee was specially and materially injured in the use, as a popular summer resort, of his property so bordering on the lake, at certain periods, prior to the commencement of the action.

The right of the appellant to use the water for the purpose for which it is used by it is not questioned; but damages were sought and recovered for such an excessive use that the appellee at certain times was deprived thereby of the reasonable use to which he was entitled in the conduct of a legitimate business carried on by him upon his premises.

The action is not one brought to vindicate a legal right, involving facts which would entitle the plaintiff to recover nominal damages only for the disturbance of his mere legal right by a wrongful diversion of water without returning it to the original source

in the lake; but it is one for the recovery of special damages arising from the disturbance of his actual use, the injury not appearing to be necessarily permanent, but being shown to have existed at particular times.

Where the structure maintained by the defendant, by the use of which the nuisance is created, is of a permanent character, but the nuisance itself is not of a permanent character, and the use in question may or may not be injurious, the rule that but one action will lie in which the plaintiff may recover all damages, past and prospective, does not apply, but the recovery will be for the damage only which has accrued to the date of the commencement of the action. Gould on Waters, section 416.

In *Miles v. Wingate*, 6 Ind. 458, a second recovery for the continuance of a nuisance, occasioned by the defendant's so constructing and maintaining a roof as to cause the water to flow from it against the plaintiff's house, was sustained.

The law will not presume that the thing complained of will cause permanent injury where the character of the injury is not manifest as a necessary result of the existence and use; but it devolves upon a plaintiff to show that the act complained of necessarily causes permanent injury to the value of the property before he can recover in one action more than the damage already accrued.

A distinction is made in the authorities between cases in which the nuisance is of a permanent character, and cases in which, though the structure or act or use which occasions the nuisance is permanent in character, its continuance is not necessarily injurious, but may or may not be so. In the former class of cases, the damage being original, and such that full compensation may be made at once, the statute of lim-

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itations begins to run from the creation of the permanent nuisance; while in the latter class the injury to be compensated in damages is that which has accrued to the commencement of the action, and for which there has not already been a recovery in another action. The nuisance in the latter case is a continuing one, for the continuance of which successive actions will lie, and the statute begins to run from the occurrence of the injury of which complaint is made. *St. Louis, etc., R. W. Co. v. Biggs*, 52 Ark. 240, 12 S. W. 331.

For a collection of authorities to this effect, see the note to the last mentioned case in 20 Am. St. 174, 176; see, also, 21 Am. and Eng. Ency. of Law, 214, *et seq.*

In *Woodin v. Wentworth*, 57 Mich. 278, 23 N. W. 813, it was held that the measure of damages for such an unreasonable detention or diversion of the natural flow of a stream as prevented a lower owner from getting enough to run his mill, was what the use by the mill was worth during the period of such deprivation. See *Crawford v. Parsons*, 63 N. H. 438; *City of Chicago v. Huenerbein*, 85 Ill. 594; *Pinney v. Berry*, 61 Mo. 359.

In *Thayer v. Brooks*, 17 Ohio 489, being an action on the case for nuisance in diverting water from plaintiff's mill by means of a ditch, the court said: "The court instructed the jury that the owner of the mill might recover for the injury sustained by the diminution in value of the mill-site, consequent upon the diversion of the water. This was going too far. Supposing the party liable at all, he was only liable, under any form of declaration, for damages actually sustained prior to the commencement of the suit."

In *King v. United States*, 59 Fed. 9, in the United States Circuit Court, District of South Carolina,

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where the damages allowed because of injury to land caused by a cross-tide dam were measured by the difference in the market values of the land, although the water of the river was raised and thrown back on the plantation when the dam was built, yet it was held that the six years limitation did not begin to run until the full consequences were ascertained and realized three years later.

In *Colrick v. Swinburne*, 105 N. Y. 503, 12 N. E. 427, it was held, that the diversion of the water of a spring from its natural channel by the owner of the land on which the spring was situated, whereby an owner below was deprived of the use of the water for his tannery, was a legal injury for which the injured party was entitled to compensation in damages; that the question whether the use by the owner of the spring was a reasonable exercise of his rights was one of fact for the jury; that the proper rule of damages was the diminished rental value of the tannery premises for the purposes of that business during the period of the diversion; and that the diversion was a continuing injury, the wrong not being referable exclusively to the day when the original wrong was committed, and the action was not barred by the statute of limitations, except as to the damages accrued prior to the statutory period of limitation before the commencement of the action.

The purpose of this action is not to question, and its result does not determine, the right of the appellant to take water from the lake; nor is it the purpose or result of the action to prevent it from taking more than a certain limited quantity of water. The gravamen is the damage caused by the extraordinary diversion of the water in such quantity as to be unreasonable, in consideration of the supply of water in the lake, and the plaintiff's right to a reasonable enjoy-

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ment of the lake in the condition in which it would be but for such unreasonable use by the defendant.

In such case, damages actually accrued before action brought can be recovered, and the difference in the rental value is a proper measure thereof; and any further damages must be recovered in a separate action when they actually accrue, and the statute runs from the time the special damage complained of occurred. Gould on Waters, sections 411, 412.

We find no available error.

Judgment affirmed.

COMSTOCK, C. J., did not take part in this cause.

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[No. 1,593. Filed March 17, 1897.]

JUDICIAL NOTICE.—*As to Terms of Circuit Court.*—The Appellate Court takes judicial notice of the terms of a circuit court.

OFFICERS.—*County Clerk.*—*Presumption.*—*Claim Against Decedent's Estate.*—In the absence of a showing to the contrary it must be presumed that a county clerk, being a public officer, did what the law required him to do, and that a claim filed against a decedent's estate was properly transferred to the issue docket.

PLEADING.—*Plea in Abatement and Plea in Bar.*—*Order of Pleading.*—A plea in abatement must precede an answer in bar.

SAME.—*Complaint.*—*Recovery Only Upon Theory Declared Upon.*—Where an express contract is declared upon there can be no recovery on an implied contract, or upon the *quantum meruit*.

From the Delaware Circuit Court. *Reversed.*

John W. Ryan, W. A. Thompson, J. N. Templer and E. R. Templer, for appellant.

Wagner & Bingham, for appellees.

WILEY, J.—The appellant was the administratrix of the estate of John F. Sanders, her deceased hus-

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band. The deceased was a lawyer and practiced his profession at Muncie, Indiana, where he died.

The record recites that "on the 20th day of May, 1893, the plaintiff * * * filed in the clerk's office of the Delaware Circuit Court the following, her complaint," etc.

To the original complaint the appellant addressed a demurrer, which was sustained by the court, and on December 8, 1893, the same being the third judicial day of the November term of said court, the appellee filed her amended complaint in two paragraphs. The substance of the first paragraph is that on or about October 1, 1890, one Hannah J. Puckett placed in the hands of the decedent \$739.26 to be loaned for her; that at that time the said decedent held himself out as a money lender and attorney at law, and that she specially instructed him to use great care and diligence in loaning the same, and to make the loan on good and sufficient security; that he accepted said money and agreed and contracted with said Hannah J. Puckett to loan the same and to use great care in making the loan, and that he would only loan it on good and sufficient security; that he loaned said money to parties who were insolvent, and that the security taken by him was wholly insufficient and worthless and that by reason thereof said money was lost to the said Puckett and to the claimant; that a commission was paid said Sanders for his services in loaning said money; that the said Puckett is dead and that appellee is her only child and heir at law; that there was no indebtedness against the estate of said Puckett; that no administration was had upon her estate; that the claimant is the owner of the claim herein and that there are no set-offs against it.

The second paragraph avers that on or about the 1st of October, 1890, Hannah J. Puckett employed

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John F. Sanders, an attorney at law, to prosecute for her an action upon a promissory note; that he accepted said employment; that a consideration was paid him for his services; that said note was the one described in the preceding paragraph; that judgment was procured thereon for \$851.85; that said Sanders could, by using due skill and diligence, have collected said judgment, but that he failed to use due skill and diligence in ordering execution upon said judgment, by reason of which said amount was wholly lost to the said Hannah J. Puckett and this claimant. Then follow averments of the death of said Puckett and that appellee is her only heir at law.

Each of these paragraphs is verified as a claim against an estate.

It is proper here, also, to state that each paragraph of the complaint charges that one Caleb G. Puckett was the surviving husband of Hannah J. Puckett, deceased; that by virtue of an antenuptial agreement between the said Hannah and Caleb, he had no interest in her estate, and that he was made a party defendant by leave of court to answer as to any interest he might have. Thereupon the said Caleb G. Puckett filed a disclaimer.

To this amended complaint, the appellant filed an answer in bar, in four paragraphs. This answer, over the appellee's objections and exception, was withdrawn by the appellant and she filed an answer in one paragraph, which is a general denial. Upon the sworn application of the appellee, Caleb G. Puckett at this time was admitted as a party defendant, and, as above stated, filed his disclaimer, and thereupon the appellant filed her plea in abatement, the material averments of which are, that the claim in controversy had never been filed against the estate of the decedent, Sanders, in the office of the clerk of the Del-

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aware Circuit Court; that the same had not been entered upon the appearance and claim docket in the clerk's office; that said administratrix had not been given an opportunity to allow or reject the claim; that she has never rejected the same upon the appearance docket, and that said claim had not been verified by the claimant or any one on her behalf, as required by statute.

The appellee demurred to this plea in abatement, which the court sustained, and the appellant excepted.

Trial by jury, verdict for plaintiff for \$874.00, and, with their general verdict, the jury returned answers to interrogatories submitted to them by the court. The appellant moved the court for judgment in her favor on the answers to the interrogatories, notwithstanding the general verdict; which motion was overruled. Over appellant's motion for a new trial, judgment was rendered for appellee.

Upon appeal, the appellant has assigned error in this court as follows: First. That the claim or complaint does not state facts sufficient to constitute a cause of action. Second. The court erred in sustaining the demurrer to appellant's plea in abatement. Third. The court erred in overruling the demurrer of appellant to the amended claim or complaint. Fourth. The court erred in overruling appellant's motion for judgment *non obstante veredicto*. Fifth. The court erred in overruling appellant's motion for a new trial. Sixth. The court erred in rendering final judgment against appellant on the general verdict.

We will first consider the second assignment of error. Section 2465, Burns' R. S. 1894 (2310, Horner's R. S. 1896), provides that claims against an estate shall be filed in the clerk's office where the estate is pending, and prohibits actions against the administrator or executor by complaint and summons.

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Section 2473, Burns' R. S. 1894 (2318, Horner's R. S. 1896), is as follows: "Immediately upon the filing of a claim against an estate, the clerk shall enter the same in the claim docket of the estate, under the appropriate headings; * * * The filing of the claim, and entry thereof upon the claim docket, shall be deemed the commencement of the action upon such claim and shall be all the notice necessary to be given to the executor or administrator of the pendency of the action."

By the provisions of section 2474, Burns' R. S. 1894 (2319, Horner's R. S. 1896), it is made the duty of the administrator, if the claim shall have been filed and placed on the appearance docket ten days before the first day of the ensuing term thereof, to admit or refuse to admit such claim in writing on the margin of the appearance docket opposite such claim. Under the same section, if such claim is not admitted, the same shall be transferred to the issue docket, and shall stand for trial at the next term thereof as other civil actions pending therein.

Appellant's plea in abatement is based on the alleged fact that the claim was not filed in the clerk's office, entered on the claim docket and passed to the issue docket, and that it was not accompanied by an affidavit as required by statute. The position assumed by appellant upon this question is at least a novel one. In her original brief, the appellant says: "This was an action commenced in the court below by the appellee, Bertha Hartge, filing a pretended verified claim against the estate of the appellant's decedent in the clerk's office. This claim was disallowed by the appellant and, under the practice, it was brought upon the issue docket as a suit pending in the court below. The first thing done after the claim had laid the requi-

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site time on the issue docket, was that the appellant filed her demurrer to the claim."

The record contains the following entry: "Be it remembered that, heretofore, to-wit: on the 20th day of May, 1893, the plaintiff * * * filed in the clerk's office of the Delaware Circuit Court the following, her complaint," etc.

At the October term, 1893, of said court, the record shows an appearance by the appellant and a demurrer by her to the complaint. This court judicially knows that the terms of the Delaware Circuit Court begin on the first Mondays of January, March, June, September and November of each year.

It affirmatively appears that the appellee's claim was filed more than ten days before the September term, 1893, of said court, at which time appellant appeared and filed her demurrer. In fact, between the filing of said claim and the beginning of the September term, the June term had intervened.

As the statute makes it the duty of the clerk to enter such claim on the claim docket and, if not admitted, to transfer it to the issue docket for trial; in the absence of any showing to the contrary, it must be presumed that the clerk, being a public officer, did what the law required him to do, and that the claim was rightfully transferred to the issue docket.

Public officers are presumed to do their duty. *State v. Wenzel*, 77 Ind. 428; *Adams v. Davis*, 109 Ind. 10.

But, aside from this presumption that the clerk did his duty and that the claim was properly placed on the issue docket for trial, we think the facts appearing in the record estop appellant from asserting any right she may have had by reason of her plea in abatement. She appeared and demurred to the original complaint; her demurrer was sustained; an amended claim or complaint was filed; she demurred to that and it was

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overruled, and appellant then answered in bar. After such answer, appellee amended her claim by making a new party and thereupon appellant withdrew her answer in bar and filed her plea in abatement.

It is a statutory rule that a plea in abatement must precede an answer in bar, and so the courts have universally held. *Collins v. Nichols*, 7 Ind. 447; *Jones v. Cincinnati, Type Foundry Co.*, 14 Ind. 89; *Field v. Malone*, 102 Ind. 251; *Glidden v. Henry*, 104 Ind. 278; *Brink v. Reid*, 122 Ind. 257; *Watts v. Sweeney*, 127 Ind. 116.

But it matters not whether this claim reached the issue docket according to the provisions of the statute, for the appellant entered a general appearance and thus waived any possible irregularity.

In the case of *Stapp v. Messeke, Exr.*, 94 Ind. 423, the court says: "An executor or administrator may require such a claim to be brought before the court in the mode prescribed by the decedent's act, but he is not bound to do so; he may make a full appearance and demur or answer, and the court will have jurisdiction, and the parties will be bound by such subsequent pleadings, as if they were required by law."

In *Frazier, Exr., v. Boss*, 66 Ind. 1, the Supreme Court, speaking by Worden, J., said: "The circuit court * * * had jurisdiction of the subject-matter; and the executor, by appearing * * * and filing his demurrer * * * waived the objection that the claim had not been before filed and placed upon the appearance docket."

Morrison v. Kramer, 58 Ind. 38, is also in harmony with the last two cases above cited.

From the recital of the facts in the record, and these authorities, we are clearly of the opinion that the court did not err in overruling appellee's demurrer to the appellant's plea in abatement.

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The fifth assignment of error calls in question the overruling of appellant's motion for a new trial, and our determination of the questions therein presented will render it unnecessary for us to consider the other errors assigned. In her motion for a new trial, appellant assigned thirty-seven causes, but for the purpose of the decision of this case we only need to notice the thirty-third, thirty-fourth, thirty-fifth and thirty-sixth causes, and they are as follows: 33d. "The verdict is not sustained by sufficient evidence." 34th. "The verdict is not sustained by the evidence." 35th. "The verdict is contrary to the evidence." 36th. "The verdict is contrary to the law."

These may all be considered together, for they raise the same question. The complaint proceeds upon the theory of an express contract between Hannah J. Puckett, the original payee of the note, and the appellant's decedent. The complaint alleges "that at the time the said Sanders received the said money he was specially instructed to use great care and diligence in making the loan thereof, and to make the loan thereof only upon good and sufficient security; that the said Sanders did then and there, upon receiving said money for the purpose of loaning, as aforesaid, agree and contract with the said Hannah J. Puckett to make the loan thereof and to use great care and diligence in so loaning and to loan it only upon good and sufficient security."

We have examined the record with very great care and are unable to find any evidence to support the verdict and judgment upon the theory of the case as it comes to us, and as made by the complaint. The appellee, having based her claim and tried her case upon an alleged special contract, she is bound thereby, and is not entitled to recover upon any other theory. *Louisville, etc., R. W. Co. v. Renicker*, 8 Ind. App. 404;

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Boesker v. Pickett, 81 Ind. 554; *Hewitt v. Powers*, 84 Ind. 295; *Telegraph Co. v. Reed*, 96 Ind. 195; *Ivens v. Cincinnati, etc., R. W. Co.*, 103 Ind. 27; *Chicago, etc., R. R. Co. v. Bills*, 104 Ind. 13; *Pennsylvania R. R. Co. v. Marion*, 104 Ind. 239; *Spencer v. McGonagle*, 107 Ind. 410; *Diltz v. Spahr*, 16 Ind. App. 591; *Browning v. Simons*, ante. 45.

The rule appears to be well settled, that where an express contract is declared upon there can be no recovery on an implied contract or upon the *quantum meruit*. Ency. of Pl. and Pract., vol. 4, p. 922; *Jonas v. King*, 81 Ala. 285, 1 South. 591; *Packard v. Snell*, 35 Ia. 80; *Davis v. Smith*, 79 Me. 351, 10 Atl. 55; *Whiting v. Sullivan*, 7 Mass. 107; *Middleport, etc., Co. v. Titus*, 35 Ohio St. 253; *Chesapeake, etc., Canal Co. v. Knapp*, 9 Pet. 541.

In *Paris v. Strong*, 51 Ind. 339, the Supreme Court, speaking by Downey, J., said: "The defendant having pleaded a general denial of the complaint, the plaintiff could not recover unless she proved the contract alleged in her complaint. * * * No rule of law can possibly be better settled, and none is more necessary in the administration of justice, than that the plaintiff must recover upon his allegations, or not at all. If this were not so, it would be a mockery to require him to state a sufficient case in his complaint. Having thus stated his case, his proofs ought to be confined to it, and if he has proved a different case, however meritorious, he should be defeated."

It was said, in the case of *Jeffersonville, etc., R. R. Co. v. Worland, Exr.*, 50 Ind. 339, that in an action based upon a special contract, the plaintiff cannot sustain his action by proof of a breach of an implied contract, or of the legal duty of the defendant as a common carrier to transport the stock in a reasonable

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time. In such case there would not be a variance, but failure of proof.

In the case of *Schaffner v. Kober*, 2 Ind. App. 409, this court, speaking by Black, J., said: "In an action on a special contract there can not be a recovery on a *quantum meruit*."

In the case of *Toledo, etc., R. R. Co. v. Levy*, 127 Ind. 168, the Supreme Court, speaking by Coffey, J., said: "It is undoubtedly true that a party cannot sue upon a parol contract and recover upon a written contract. He must recover upon the case made by his complaint. A complaint cannot be made elastic so as to bend to the changing views of counsel as the cause proceeds. It must proceed to the end upon the theory upon which it is constructed."

It has been held that in an action on a contract against two defendants and the proof shows a contract with but one of them, there can be no recovery. *Cobb v. Keith*, 110 Ala. 614, 18 South. 325; *Whittemore v. Merrill*, 87 Me. 456, 32 Atl. 1008.

It is of the highest importance to the administration of the law, that courts should adhere most tenaciously and strictly to this rule of pleading, which requires the pleader to be bound by his cause of action as stated by him. Otherwise his adversary could have no assurance of the facts he would have to controvert to meet his attacks, and would be taken unaware in the forensic encounter at the bar.

There are other errors assigned in the record which appellant's learned counsel have discussed, but having reached the conclusion that the judgment must be reversed because there is no evidence in the record to support it, we deem it unnecessary to consider any other question.

Judgment reversed, with instructions to the court below to sustain appellant's motion for a new trial.

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HENSLEY, ADMINISTRATOR, v. TUTTLE.

[No. 2,041. Filed March 17, 1897.]

HUSBAND AND WIFE.—*Earnings of Wife.*—*Services Rendered by Husband and Wife Jointly.*—The common law rule that the earnings of the wife belong to the husband is still in force in this State, except in cases where she carries on a separate business, or labors for others on her own account; and where she assists her husband in nursing and caring for an aged person, such work being in line of household duties, the husband may recover in an action for the services rendered by himself and wife.

EVIDENCE.—*Endorsement on Note.*—Where a note, payable at maker's death, was placed by the maker in the hands of a third person, and endorsed as follows: "Both parties agreed, left in possession of Alfred Jones," it is not error to admit the endorsement in evidence, it being shown that the endorsement was made at the time the note was executed and in the presence of the payee.

SAME.—*Delivery of Note to Third Party.*—*Endorsement as Evidence.*—The endorsement on a note, "Both parties agreed, left in possession of Alfred Jones," it being shown that the note was left with the third party, is sufficient to sustain a finding that the note was delivered.

From the Delaware Circuit Court. *Affirmed.*

John W. Ryan and *W. A. Thompson*, for appellant.

Edward M. White and *Wagner & Bingham*, for appellee.

ROBINSON, J.—Appellee filed a claim against the estate of appellant's decedent. The claim was transferred to the issue docket and appellant answered in four paragraphs: general denial, plea of payment, plea of statute of limitations, and want of consideration to that part of the claim consisting of a note. With the answer, appellant filed a set-off. The cause was put at issue and submitted to a jury. With the general verdict in appellee's favor, the jury returned answers

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to certain interrogatories. Over appellant's motion for a judgment in his favor on the answers to interrogatories, notwithstanding the general verdict, and his motion for a new trial, judgment was rendered on the verdict.

The errors assigned are, the overruling of appellant's motion for judgment on the answers to the interrogatories, to modify the judgment, and for a new trial.

It is argued that the judgment is not supported by the evidence, is contrary to the evidence, and is too large.

A part of the claim sought to be recovered is for nursing and care of decedent during her last sickness. The jury, in answer to interrogatories, found that appellee's services in this regard were worth \$189.00, and that of the total amount allowed in the general verdict that sum was allowed him for such services. It is earnestly contended that the evidence shows that, in nursing and caring for decedent, appellee was, during all the time, assisted by his wife, and that the service was a joint service by appellee and his wife, and that there is no evidence that the services were performed by appellee alone.

It appears that decedent was a member of appellee's household and for six years prior to and during her last sickness was living with appellee and his wife. The fact that the wife assisted her husband in nursing and caring for decedent does not necessarily give her a separate cause of action for such services. The services she rendered were for her husband, and were in the line of household duties. The statute which gives the wife the right to recover for her own services does not change the relation between husband and wife, nor does it exonerate the wife from the performance of any proper services for the benefit

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of the husband. We do not mean to hold that a wife could not enter into a contract for the value of her services in such a case and maintain an action therefor, but in the case at bar, the law implies a promise to pay the appellee the reasonable value of his services, and any assistance rendered by the wife was for the benefit of the husband. The wife has the same right to give her husband her services in the household that she had before the passage of the statute. The statute giving the married woman the earnings and profits accruing from her trade, business, services or labor, expressly excepts labor for her husband or family.

The common law rule that the earnings of the wife belong to the husband is still in force in Indiana, except in cases where she carries on a separate business or labors for others on her individual account.

In *Board of Commissioners v. Brown*, 4 Ind. App. 288, in a suit by a husband against the county for services rendered his afflicted pauper brother, whom he kept in his family, it was held proper to admit testimony as to the services of the wife and the value thereof. Section 6975, Burns' R. S. 1894; *Citizens' Street R. W. Co. v. Twiname*, 121 Ind. 375.

A part of appellee's claim allowed by the jury consisted of a note executed by the decedent and due and payable to appellee at decedent's death. Endorsed on the back of the note was the following: "Both parties agreed, left in possession of Alfred F. Jones." It is argued that the court erred in admitting the endorsement in evidence, and that there is no evidence to sustain the finding of the jury that the note was ever delivered. The witness Jones testified that the endorsement was written on the back of the note at the time it was signed by the decedent, and it appears that appellee was present at the time. The endorsement was

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made at the suggestion of the decedent, and the word "parties" used in the endorsement must be held to mean the maker of the note and the payee. The appellee could have no interest in the note until it had been delivered, and the fact that the parties agreed, as shown by the endorsement, to leave it with a third party, and it was left with such party, was sufficient to sustain the finding of the jury that the note was delivered.

To certain interrogatories the jury answered that they allowed appellee \$5.00 for tile furnished by appellee for the decedent's land, and \$10.50 for taxes paid by appellee for decedent, at her request. It is contended that the evidence does not support these answers. The evidence upon which they are based is not very clear or satisfactory, yet there was some evidence to sustain the answers as to each of the above items. The jury further answered that appellee had paid out \$7.50 for pasturing decedent's cow, but counsel have overlooked the further answer in which the jury said that appellee is entitled to recover nothing for cow pasture, and it appears this item was not included in the general verdict.

We think the general verdict is fully sustained by the answers to the interrogatories. The jury, by these answers, say that appellee is allowed \$189.00 for nursing and care of decedent during the last eighteen weeks of her life; \$71.26 on the note, \$5.00 for amount paid for tile, and \$10.50 for money paid out for taxes, which sums taken together, make the amount in the general verdict. Taking these answers in connection with the further answers to interrogatories that decedent was about seventy-one years old at the time of her death; that in March, 1888, and until her death in December, 1894, she owned eleven acres of land, on which was a house; that in March, 1888, the appellee

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and his wife, decedent's daughter, moved into decedent's house at her request, where they all lived together until decedent's death; that during that time decedent was feeble and in poor health; that the rental value of decedent's house and eleven acres of land was \$30.00 per year; that appellee paid no rent; that he was entitled to recover nothing for attending to the business of decedent and taking care of her and furnishing her, during all that time, except for the last eighteen weeks of her life, when she was helpless; taking all these facts, we do not think it can be said that the verdict is excessive; but, on the other hand, we think the jury, under all the evidence, reached a just and equitable conclusion, which should not be disturbed.

Judgment affirmed.

ROMEL v. ALEXANDER.

[No. 2,077. Filed March 17, 1897.]

CONTRACTS.—*Complaint for Breach of, When Need Not Aver Performance by Plaintiff.*—An action may be maintained for breach of contract, without alleging performance on the part of plaintiff, where the plaintiff's covenant or stipulation constitutes only a part of the consideration, and the defendant has received a partial benefit, and the plaintiff's breach might be compensated in damages.

From the Laporte Superior Court. *Affirmed.*

C. R. Collins and *J. B. Collins*, for appellant.

James F. Gallaher, for appellee.

HENLEY, J.—The appellant was the defendant in the lower court. The complaint was based upon an agreement and contract of sale in writing. The complaint was, in substance, as follows: That on the 5th

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day of December, 1893, plaintiff and defendant entered into a certain contract, by the terms of which the copartnership previously existing between them under the firm name and style of Alexander & Company and The Clear Lake Ice Company, was dissolved, and the property owned by said partnership was divided between them; that, by the terms of said contract, the defendant, Charles Romel, in consideration of the transfer to him of certain partnership property by this plaintiff, agreed to pay and discharge a certain note for the sum of \$800.00, given by said firm to the Citizens' Bank of Michigan City, Indiana, dated October 17, 1893, and payable ninety days from date at said bank, and to save Judson Alexander, this plaintiff, harmless on account thereof, that one C. E. Meyer became surety for the said firm on said note, and in order to secure said Meyer against liability as surety the said firm executed to said Meyer a chattel mortgage on their firm property, which said property was afterwards divided between them, plaintiff and defendant, according to the terms of their said contract, and that this plaintiff transferred to the defendant the partnership property which was, by the terms of said contract, to be transferred to him, and said property was taken possession of by the defendant and sold and otherwise disposed of by him, and the proceeds devoted entirely to his own use; that the said defendant did not pay and discharge said note, but allowed the same to be paid by the surety, Meyer, who thereupon foreclosed his chattel mortgage and took possession of the property of this plaintiff of the value of \$700.00 and sold the same to satisfy said mortgage, and that by reason of defendant's failing to pay said note as provided by said agreement, this plaintiff is liable to said surety, C. E. Meyer, in the further sum of \$400.00. Wherefore, he has been dam-

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aged in the sum of \$1,000.00, for which he demands judgment.

The contract, which is made a part of the complaint, is, in substance, as follows: First. That the partnership heretofore existing between appellant and appellee, under the firm name and style of Alexander & Company and The Clear Lake Ice Company, is hereby mutually dissolved. Second. In consideration of such dissolution the property of such partnership is hereby divided between appellee and appellant, as follows: That appellant is to have all the property connected with the ice business of said firm, including five ice houses, three ice wagons and spring wagon, and all property bought of August Dick, and in consideration of such transfer the appellant is to pay and discharge a note of \$800.00, payable to the Citizens' Bank, and save appellee harmless on account thereof. Third. That appellee is to have all other property of said copartnership, including all property connected with the transfer business, and of all other property of whatever description, name and nature, owned by either of said copartnerships, and is to pay all other debts of said firms, with the exception of the \$800.00 note above described, which appellant had agreed to pay. That said appellee was to have and collect all accounts due either of said partnerships, and agrees to pay appellant the sum of \$75.00 on or before January 5, 1894, and is to fill all ice contracts up to January 1, 1894, and have the money received therefrom.

A demurrer was filed and overruled to the complaint. The ruling of the lower court upon this demurrer is the only question discussed by counsel for appellant, who contend that the complaint is insufficient because it does not allege that appellee had performed all the conditions of said agreement before he began this action against appellant.

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We do not believe that this was necessary under the contract declared upon. The complaint does aver "that this plaintiff transferred to the defendant the partnership property which was, by the terms of said contract, to be transferred to him, and said property was taken possession of by the defendant, sold and otherwise disposed of by him and the proceeds devoted entirely to defendant's own use."

We think this averment sufficient to sustain plaintiff's complaint. This was an action for damages upon a written contract, which was an essential part of the complaint and which was filed with and made a part of the complaint. The property which it is alleged by the complaint was transferred to, and taken possession of by the defendant is more fully described in this contract.

It is contended, on behalf of the appellee, that he was entitled to bring this action against the appellant without alleging that he had paid those certain debts of the partnership, and without alleging that he had paid to appellant the sum of \$75.00. We are of the opinion that for a breach of any condition of this contract resulting in damage to appellee, he was entitled to bring an action thereon against appellant, without alleging that he [appellee] had performed all the conditions on his part to be performed.

Where a party has received a part of the consideration for his agreement, it would be unjust, that, because he has not had the whole, he should enjoy that part without paying or doing anything for it, and, therefore, the law obliges him to perform the agreement on his part, and leaves him to his remedy to recover any damage he has sustained in not having received the whole consideration. Appellee's covenant or stipulation constituted only a part of the consideration of the contract. Appellant has actually received

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a partial benefit. A breach of the contract on the part of the appellee might be compensated in damages; hence, the action in this case may be supported against appellant without averring performance by the appellee. Chitty on Pleading, Vol. 1, p. 323; *Pordage v. Cole*, 1 Saund. 319; *Pickens v. Bozell*, 11 Ind. 275; *Boyle v. Guysinger*, 12 Ind. 273; *Cummings v. Pence*, 1 Ind. App. 317.

In all these cases, and numerous others therein cited, the rule as stated therein is, that where there is a failure to perform according to the terms of the contract, and the breach may be compensated in damages, an action will lie on the contract; the defendant having the right to set up by way of counterclaim the damages sustained by him on account of such failure.

We think the case before us comes clearly within the above rule. We find no error in the record.

Judgment affirmed.

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RAILWAY COMPANY v. HAYS ET AL.

[No. 1,762. Filed June 11, 1896. Rehearing denied December 30, 1896. Motion to vacate judgment overruled March 18, 1897.]

JUDICIAL NOTICE.—*As to Use of Railroad Right of Way.*—The Appellate Court knows judicially that the right of way of railway companies is frequently used for other purposes than that of simply operating trains thereon. p. 264.

HIGHWAYS.—*Railroad Right of Way May be Assessed for Improvement Of.*—The right of way of a railway company may be assessed for the improvement of highways. p. 265.

JUDGMENT.—*Railroads.*—*Lien for Improvement of Highway.*—*Personal Judgment May be Rendered.*—A personal judgment may be rendered against a railway company in an action to foreclose a lien for the improvement of a public highway. pp. 265, 283.

MUNICIPAL CORPORATIONS.—*Improvement of Street.*—*Preliminary*

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Order.—The preliminary order by resolution declaring a necessity for the improvement of a street, as provided by section 4289, Burns' R. S. 1894, is not essential to the jurisdiction of the town board. pp. 265, 266.

SAME.—*Public Improvements.*—*Irregularity of Proceedings.*—Where the whole matter of making local improvements is conferred upon municipal corporations, and exclusive and original jurisdiction over the same is given them for that purpose the proceeding will not be void if there has been an attempt to comply with the statutory requirements, although such attempt does not amount to a strict compliance. An irregularity that will overthrow the proceedings must be such as will prevent the execution of the judgment. p. 267.

APPELLATE COURT.—*Jurisdiction Of.*—The Appellate Court has the right to construe and apply the constitution. It is only when the validity of the statute is involved that jurisdiction is denied. p. 268.

STATUTORY CONSTRUCTION.—*Improvement of Street Adjoining Railroad Right of Way.*—*Constitutional Law.*—The contention of a railroad company that its right of way would not be benefited by the improvement of an adjoining highway, and that to charge the costs thereof upon the right of way would be taking property without due process of law, goes to the construction and application of the statute and not to its constitutionality. pp. 268, 282.

APPELLATE COURT.—*Jurisdiction Of.*—*Validity of Ordinances.*—An objection to an ordinance which goes only to matters of form or to irregularities in the proceedings of municipal authorities is a question that may properly be passed upon by the Appellate Court. pp. 269, 270.

MUNICIPAL CORPORATIONS.—*The Use of the Word "Street" in an Ordinance.*—The use of the word "street" in an ordinance passed by a town board, providing for a certain improvement, sufficiently indicates that it was not an ordinary public highway which was being improved, but a highway within the town. pp. 270, 271.

APPELLATE COURT.—*Jurisdiction Of.*—Where a case appealed to the Appellate Court is found to be within the jurisdiction of the Supreme Court, by reason of the fact that a constitutional question is involved therein, the Appellate Court has no authority except to cause it to be duly certified to the Supreme Court, and if, instead of doing so, this court should proceed to determine the cause and should affirm or reverse the judgment of the court below, the judgment of this court would be void. p. 280.

SAME.—*Power of to Review Cause After Judgment is Certified to Trial Court.*—*Jurisdiction.*—Where a cause has been appealed to the Appellate Court and the judgment affirmed, and a petition for

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a rehearing filed and overruled, and the judgment of the Appellate Court certified to the trial court, the Appellate Court may again take the matter up, and look, not only to the opinion delivered at the original hearing, but also to the transcript of the record, and the briefs upon the original hearing, to ascertain whether the constitutionality of a statute was in question and such question duly presented on the original hearing. *p. 281.*

From the Jay Circuit Court. *Affirmed.*

N. O. Ross, J. J. M. LaFollette and O. H. Adair,
for appellant.

C. Corwin and J. M. Smith, for appellees.

LOTZ, J.—This action was brought by the appellees against the appellant to declare a lien and enforce the collection of an assessment for the improvement of a street within the incorporated town of Dunkirk. The improvement was made in pursuance of a resolution and an ordinance adopted by the board of trustees.

The north side of the street improved for its entire length, abuts upon the south side of the appellant's right of way. The improvement was made by grading and graveling the center of roadway its entire length, and by constructing a sidewalk along the entire south side of the street with no sidewalk on the north side next to the right of way. The contract for such improvement was let to the appellees. The work was done and the costs thereof were estimated and assessed by the running foot including both street and sidewalk and the appellant as the owner of the right of way was charged with one-half thereof.

In the circuit court there was a trial and finding in favor of the appellees in the sum of \$1,460.00, and the same decreed to be a lien upon the right of way; and the appellant was ordered and directed to pay the same within ninety days. The appellant insists that the judgment rendered is erroneous because the stat-

ute under which the proceedings were had does not contemplate that the right of way of a railroad should be assessed to make such improvements; that such assessments can only be upheld upon the theory that the land receives a benefit equal to the assessment; that in its very nature the right of way abutting can not receive a specific benefit, and that without such benefit there is no constitutional warrant to seek payment elsewhere, for it would be taking property without compensation.

There are authorities which support appellant's contention. *City of Philadelphia v. Philadelphia, etc., R. R. Co.*, 33 Pa. St. 41; *The Junction R. R. Co. v. City of Philadelphia*, 88 Pa. St. 428; *Detroit, etc., R. W. Co. v. City of Grand Rapids*, 28 L. R. A. 793; 63 N. W. 1007; *Chicago, etc., R. W. Co. v. City of Milwaukee*, 28 L. R. A. 249, 62 N. W. 417; *Allegheny City v. Western Pa. R. R. Co.* 138 Pa. St. 375, 21 Atl. 763; *Sweaney v. Kansas City R. W. Co.*, 54 Mo. App. 265.

On the other hand there are cases which seemingly support a contrary doctrine. *Chicago, etc., R. W. Co. v. Chicago*, 90 Ill. 573; *City of Chicago v. Baer*, 41 Ill. 306; *Chicago, etc., R. R. Co. v. City of Moline*, 41 N. E. 877; *Northern, etc., R. W. Co. v. Connelly*, 158 Ill. 64, 10 Ohio St. 159; *Burlington, etc., R. R. Co. v. Spearman*, 11 Ia. 112; *In re. North Beach, etc., R. R. Co.*, 32 Cal. 499.

The court knows judicially that the right of way of railway companies is frequently used for other purposes than that of simply operating their trains thereon. The right of way is frequently used for depot purposes; for track yards, and for purposes of loading and unloading freight and for storing cars and materials. When so used, a public highway affords the company ready means of ingress thereto and egress

therefrom for the transaction of its business, and is a direct benefit to that portion abutting thereon. This court cannot say as a matter of law that the highway improvement was not a benefit to the abutting right of way. The legislature in authorizing the construction of such improvements has assumed that they will benefit the abutting property and has directed that the costs shall be estimated according to the whole length of the street or alley or the part thereof to be improved, per running foot. Section 4290, Burns' R. S. 1894.

Whatever the rule may be elsewhere it is settled in this State that the right of way of a railway company may be assessed for the improvement of highways. *Peru, etc., R. R. Co. v. Hanna*, 68 Ind. 562.

This court in the case of *Lake Erie, etc., R. W. Co. v. Bowker*, 9 Ind. App. 428, impliedly held that the right of way and depot lot of a railway company could be assessed for the construction of a sewer.

A public highway is certainly of as much benefit to the right of way as a sewer.

It is further insisted that no personal judgment can be rendered in this proceeding. This contention has been decided adversely to the appellant by this court and by the Supreme Court, and it needs no further consideration now. See *Louisville, etc., R. W. Co. v. State, ex rel.*, 8 Ind. App. 377; *Lake Erie, etc., R. W. Co. v. Bowker, supra*; *Louisville, etc., R. W. Co. v. State*, 122 Ind. 443.

Several other objections are made to the proceedings of the town board. It is insisted that the board never made any order by resolution or otherwise declaring a necessity for such improvement as provided by section 4289, Burns' R. S. 1894. The existence of such order it is claimed is essential to the jurisdiction

of the board, and that without it the whole proceedings are void.

The statute requires the board to "declare by resolution the necessity therefor." In this case the board passed a declaratory resolution for the proposed improvement, and gave notice thereof. This resolution in general terms described the improvement and the streets upon which it should be made, and directed that notice thereof be given by publication, and that the board of trustees would meet at a certain place and time "for the purpose of hearing any objections that may be urged to the necessity of said improvement by any owner of property along the line of said proposed improvement." Afterwards the board duly enacted an ordinance for the making of such improvement; but this ordinance nowhere declares the necessity for such improvement.

In *Barber, etc., Paving Co. v. Edgerton*, 125 Ind. 455, the Supreme Court in speaking of such resolution said, "It is a mere preliminary step, looking to a public improvement, to be made or not, as the common council in its discretion may determine, from which it may recede at any time before the contract for the improvement is concluded."

In the case before us the board had jurisdiction over the general subject of the improvement of streets by force of the statute. It acquired jurisdiction over the particular subject-matter by the declaratory resolution and the notice thereof. It acquired jurisdiction over the person of appellant by virtue of the notice. The town board was the exclusive judge of the necessity of the improvement and when it proceeded to act and ordered the improvement made, such order necessarily involved a determination of the necessity of the work. The declaratory resolution we construe as an attempt to comply with the statute.

It is also insisted that the proceedings are invalid because the entire work of graveling the street and making the sidewalk on the side most distant from the railroad was let in one contract at so much per running foot, without division as between the property owners on each side of the street.

On the trial of the cause the court deducted the cost of the sidewalk from the cost of the street and charged the appellant with the costs of the street only. The course adopted by the board was irregular, but it did not invalidate the whole assessment. *Lake Erie, etc., R. W. Co. v. Walters*, 13 Ind. App. 275.

It has been often held that where the whole matter of making local improvements is conferred upon municipal corporations, and exclusive and original jurisdiction over the same is given them for that purpose, the proceeding will not be void if there has been an honest attempt to comply with the statutory requirements, although such attempt does not amount to a strict compliance. If the corporation has jurisdiction over the subject and the person, an irregularity that will overthrow the proceedings must be of that grave character that will prevent the execution of the judgment. *Barber, etc., Paving Co. v. Edgerton, supra*, p. 463, and cases cited.

The appellant also insists that the proceedings are invalid because the declaratory resolution does not state the kind, size and location of the improvement; and that the final estimate and description of the property does not comply with the requirements of the statute. There was, however, a substantial compliance with the statute in each of these particulars. These objections are but irregularities, and under the rule above announced do not invalidate the proceedings. A correct description of the property was made in the final judgment.

Judgment affirmed.

Ross, J., did not participate in the decision of this case.

ON PETITION FOR REHEARING.

LOTZ, C. J.—The appellant in its petition for a rehearing earnestly insists that the statute authorizing the assessment of its right of way is unconstitutional; that for this reason this court had no jurisdiction, and that the cause should have been transferred to the Supreme Court as directed by the statute.

It is true that on the former hearing appellant's counsel asked that the cause be transferred to the Supreme Court, with the suggestion that the case of *Peru, etc., R. R. Co. v. Hanna*, 68 Ind. 562, be overruled; but we did not understand that the transfer was asked for on the ground that the statute was unconstitutional.

It will not be seriously contended that a statute which places or imposes the costs of the improvement of a street on the abutting property is unconstitutional. If we understood appellant's contention it was that its right of way could not be benefited by the improvement, and that to charge the costs thereof upon the right of way, would be taking property without due process of law. This contention goes to the construction and application of the statute, not to its constitutionality. This court has the right to construe and apply the constitution. It is only when the validity of a statute is involved that jurisdiction is denied it.

In our former opinion we held that the right of way of a railway company may be benefited by a street improvement. We know of no good reason for changing our holding in this respect. If the appellant's property was benefited by the improvement then it was

properly assessed. If it was not benefited then it should not have been assessed. The contention about benefits or no benefits does not involve the constitutionality of the statute.

It is also true, as appellant quotes, that in our former opinion in stating the contention of counsel, we used the expression that without a benefit to the abutting property there is no constitutional warrant to seek payment elsewhere, for it would be taking property without compensation. This expression does not imply that the constitutionality of the statute was involved. It was used in connection with the contention that no personal judgment could be rendered. It is the process or method of enforcing payment by the court that is questioned, not the constitutionality of the statute.

It is also insisted that this court has no jurisdiction because the validity of an ordinance of a municipal corporation is necessarily involved in the controversy.

On the former hearing the appellant did not question the jurisdiction of this court on this ground. It is true that the validity of the ordinance was questioned, but the objections went to matters of form and to irregularities in the proceedings rather than to matters of substance.

By section 6562a, Horner's R. S. 1896, it is provided that this court "shall not have jurisdiction of any case where the constitutionality of a statute, federal or state, or the validity of an ordinance of a municipal corporation is in question and such question is duly presented."

The manifest purpose of the statute is to reserve certain grave and important questions to the determination of the Supreme Court. If an ordinance of a municipal corporation is questioned because it is unconstitutional or in conflict with the statutes or is un-

reasonable, these are questions which concern the public, and it was the legislative intent to reserve them for the determination of the Supreme Court. But an objection to an ordinance which goes only to matters of form or to irregularities in the proceedings of the municipal authorities is not a question of that grave character and dignity that affects the public, and may properly be passed upon by this court. Accordingly, this court has on former occasions exercised this power, and determined the validity of ordinances when so assailed. *City of Hammond v. New York, etc., R. W. Co.*, 5 Ind. App. 526; *Dugger v. Hicks*, 11 Ind. App. 374; *New Albany, etc., Coke Co. v. Crumbo*, 10 Ind. App. 360.

It is lastly contended that there is nothing in the complaint, proceedings of the town board, or the findings of the court to show that the appellant's right of way, sought to be made liable, is within the corporate limits of the town of Dunkirk, and that, therefore, there was no authority to assess it with the costs of construction.

The declaratory resolution and the notice thereof, and the notice to contractors and the contract itself, each states that the streets and sidewalks to be improved were in the town of Dunkirk, Indiana.

It is true that neither the ordinance nor the judgment, in direct terms states that the improvement was within the corporate limits, but it does appear that the appellant's tract or parcel of land abutted upon Railroad street. Originally, the word street meant a paved way or road. All streets are highways, but not all highways are streets. The statutes of this State make a clear distinction between common roads or highways and the streets of cities and towns. *Debolt v. Carter*, 31 Ind. 355, 369; *State v. Moriarty*, 74 Ind.

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103. "A street is a road or public way in a city, town or village." Elliott, Roads and Streets, p. 12.

The use of the word, street, indicates that it was not an ordinary public highway which was being improved, but a highway within the town.

The ordinance was passed by the town board in the exercise of the statutory authority to make local improvements by special assessments on abutting property. A municipal ordinance is a local law, and the same rules govern in its construction as apply to general statutes. The presumption is in favor of the regularity and validity of official acts. "*Prima facie*, every statute is confined in its operation to the persons, property, rights, or contracts, which are within the territorial jurisdiction of the legislature which enacted it. The presumption is always against any intention to attempt giving to the act an extraterritorial operation and effect." Black Interp. of Laws, p. 91; Endlich Interp. of Statutes, section 171; *Stanton v. City of Chicago*, 154 Ill. 23, 39 N. E. 987. The case last cited is very similar to the case at bar on this point, and is directly opposed to appellant's contention. See also *Stockwell v. State, ex rel.*, 101 Ind. 1.

The petition is overruled.

ON MOTION TO VACATE JUDGMENT.

BLACK, J.—An appeal was brought to this court by the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, from a judgment rendered against it in the Jay Circuit Court in favor of John Hays and John Reese. The transcript was filed in the office of the clerk of this court, and an assignment of errors was entered thereon, on the 1st of June, 1895. On the 11th of June, 1896, a judgment of affirmance was rendered, the opinion of the court being delivered by Lotz, J. At the

same term of this court, on the 18th day of July, 1896, the appellant in said cause filed its petition for a rehearing, which was carried over into the present term, and, on the 30th of December, 1896, was overruled, an opinion thereon being rendered per Lotz, J.

On the 7th of January, 1897, the attorney for the appellant in that cause filed in this court his petition entitled as in said cause. Omitting the caption and the signature of the attorney, said petition is as follows: "The appellant asks the court to withdraw its opinions heretofore rendered and filed in the above entitled cause, and transfer the same to the Supreme Court, for the reason that the constitutionality of the act under which the appellees recovered the judgment appealed from was duly presented in said cause and argued before this court; for which reason this court had no jurisdiction to decide said cause, and it was its duty to transfer said cause to the Supreme Court of Indiana, which it has neglected to do; and that for want of jurisdiction its decision in said cause is void. This application is made in order, if possible, to obviate the necessity of a writ of mandate from the Supreme Court requiring this court to transfer said cause to that court. All of which is respectfully submitted."

With this petition the attorney who signed it filed a paper endorsed as a brief, in which, in support of the motion, "the court is referred to the briefs on file in this cause, and particularly to the motion for a rehearing and the brief in support thereof." This brief is upon a single page. No argument is offered and no authorities are mentioned.

It is provided by statute, section 674, Burns' R. S. 1894 (662, Horner's R. S. 1896), that at any time within sixty days after any cause is determined in the Supreme Court, either party may file a petition for a re-

hearing; if not so filed, the decision and instructions of the Supreme Court shall be certified to the court below, unless otherwise ordered by the court.

It is also provided, section 1351, Burns' R. S. 1894 (6575, Horner's R. S. 1896), that a rehearing may be prayed in any cause in this, the Appellate Court, within the time allowed therefor by the Supreme Court, and may be granted for sufficient cause, and the judgment of the Appellate Court shall not be certified to the court below until after the expiration of the time allowed for the petition for a rehearing, unless such rehearing be waived in writing.

A petition for a rehearing must be filed within sixty days after the cause is determined. When that period has expired after judgment of affirmance or reversal, the statutory right of a party to petition for a rehearing is gone.

The present application cannot be regarded as a petition for a rehearing. The railroad company has exhausted its statutory right.

To accomplish the end sought by the petitioner in the present application, that is, the transfer of the cause to the Supreme Court, it would be necessary to set aside the judgment of affirmance rendered in said cause, and thereby to make it a cause pending in this court.

Among the statutory provisions relating to this court are the following: "In any case wherein an appeal has been taken from a lower court to the Appellate Court, and the same should have been taken to the Supreme Court, it shall be the duty of the Appellate Court on its own motion to cause such case to be transferred to the Supreme Court. * * * That in any case pending in the Appellate Court, in which said Appellate Court shall conclude that any decision of

the Supreme Court should be overruled or modified, it shall be their duty to transfer said cause, with their opinion of what the law should be held to be, to the Supreme Court, and the Supreme Court shall thereupon have jurisdiction of and decide the entire case." Section 1362, Burns' R. S. 1894 (6586, Horner's R. S. 1896).

"The appellate court shall not have jurisdiction of any case where the constitutionality of a statute, federal or state, or the validity of an ordinance of a municipal corporation is in question and such question is duly presented." Section 1336, Burns' R. S. 1894 (6562a, Horner's R. S. 1896).

The same section provides for the certification of such a case to the Supreme Court.

The appellant in said cause, having exercised its statutory right to ask a rehearing, and a rehearing having been denied, now, by the present application, seeks to have the judgment rendered by this court at a former term set aside as void, because of alleged want of jurisdiction of the subject-matter.

It is said in the petition before us that the decision was void, and the petitioner seems to proceed upon the theory that if we do not decide in his favor upon this application our decision will be void. That is, he first invokes the action of this court in the setting aside of its judgment as void, before seeking the intervention of the Supreme Court by mandate.

This proceeding, it is hardly necessary to say, is not one invoking the power of this court to make its record show, now for then, what was done, so that the record may conform to the truth. Nor are we asked to render a different final judgment in the cause; but we are asked, in effect, to declare the judgment void and to recall the certification of the judgment of af-

firmance to the court below, and then, the cause being *in fieri*, to transfer it to the Supreme Court.

Mr. Freeman, in speaking of the common law power of courts to vacate judgments, says: "One rule is, however, undoubted. It is, that the power of a court over its judgments, during the entire term at which they are rendered, is unlimited." Freeman Judgments, section 90. See, *People v. Zane*, 105 Ill. 662; *Ex parte Lange*, 18 Wall. 163.

"All judgments regularly entered must be final at the end of the term. After that time the courts which entered them have no power to set them aside, unless some proceeding for that object has been commenced within the term and has been continued for hearing, or otherwise remains undisposed of. In those cases in which the court afterward interferes to vacate or annul a judgment, the interference can only be justified on the ground that the judgment was procured in such a manner as to indicate that it was not intended to be authorized by the court, or if authorized by the court, that it is nugatory for want of jurisdiction over the parties. * * * The want of power to vacate judgments after the lapse of the term at which they were regularly entered exists in the appellate as well as in the subordinate courts." Freeman Judgments, section 96.

Power to set aside a judgment as void has frequently been exercised on application made at a term subsequent to that at which the judgment was rendered.

In *Ex parte Crenshaw*, 15 Pet. 119, the Supreme Court of the United States declared its decree of reversal pronounced at the preceeding term null and void and revoked its mandate to the lower court, because the appellee Crenshaw, who had not appeared to the appeal, was not cited to appear as required by the

statute, the decree so declared void having been rendered under the belief that the citation had been issued and served.

It was said, per Taney, C. J.: "A motion has been made, at the present term, on behalf of Crenshaw, to set aside and annul the judgment and decree of this court; and also to dismiss the appeal. As there is no case now pending here, between these parties, there is nothing upon which an order to dismiss would operate. But upon the facts above stated, it is very clear, that the case was not legally before us at the last term; and the decree then pronounced must, therefore, be declared null and void, and the mandate directed to the circuit court must be revoked."

In *Pettus v. McClannahan*, 52 Ala. 55, it was said: "If a judgment or decree is not void for want of jurisdiction, the court rendering it, whether it is a court of superior or inferior, of general or limited jurisdiction, has no power, at a term subsequent to its rendition, to vacate or alter it. The correction of clerical misprisions is the extent of the power the court can subsequently exercise. * * * When, however, a court has rendered a judgment or decree void on its face, a due regard to its own dignity, the protection of its own officers, and the preservation of the judgments it may rightfully render, demand that it should on a proper application vacate such judgment or decree at any time subsequent to its rendition. If fraud is not imputed, the invalidity of the judgment must be apparent on the face of the record, and must not depend on matter extrinsic to, or *dchors* the record, except in the event of the death of either party, on whom the judgment or decree is to operate, when it was rendered."

In *Donnell v. Hamilton*, 77 Ala. 610, the question being whether the Supreme Court of Alabama could set

aside its own judgment and decree after adjournment of the term at which it was rendered, it was said: "We think it cannot do so, unless the judgment or decree which is sought to be set aside is void on its face."

The terms of this court, like the terms of our Supreme Court, are six months in length. When a petition for a rehearing has been overruled, or when the period of sixty days has elapsed after the determination of a cause without the filing of a petition for a rehearing, the judgment is certified to the court below. When the judgment has been properly certified to the court below, this court has lost jurisdiction of it. *Parker v. State, ex rel.*, 133 Ind. 178.

The statute relating to petitions for rehearing in the Supreme Court, above mentioned, provides, that if a petition for a rehearing is not filed within sixty days "the decision and instructions of the Supreme Court shall be certified to the court below, *unless otherwise ordered by the court.*" The power of the court to recall its decision within the sixty days is thus recognized.

While the statute relating to this court does not contain such a provision, the court, in a number of instances, has exercised the power to set aside its judgment of affirmance or reversal and recall its opinion within the period of sixty days after judgment.

Whether this court retains the common law plenary authority to modify or set aside its decisions during the term, need not here be decided. The judgment we are now asked to set aside was rendered at the last term.

The Supreme Court of Indiana sustained a motion to set aside its judgment of reversal made at a preceding term, on the ground that the appellant had died before the appeal was taken, the Supreme Court having no notice of this fact when it decided the case. It was said: "This court never acquired any jurisdiction

of Taylor, he having died more than a year before the appeal was taken to this court, and the judgment in his favor would seem to have been void." *Taylor v. Elliott*, 52 Ind. 588.

The court said, also, that there is some conflict in the decisions upon the point whether a judgment in such case is void or voidable only; but that in either case it ought to be set aside and vacated on motion, as could have been done at common law by the writ of error *coram nobis*, whereby a judgment might be reversed in the court that rendered it for error in matter of fact only, and not in point of law, error of fact not being error of the judges, and reversing it not being the reversal of their own judgment, the writ not being intended to authorize any court to review or revise its own opinions. See also *Sanders v. State*, 85 Ind. 318; *Board, etc., v. Brown*, 14 Ind. 191.

State v. Waupaca County Bank, 20 Wis. 672, was an application to the Supreme Court of Wisconsin to vacate its judgment, rendered more than three years before the time of the application, on the ground that the court had not jurisdiction to render the judgment. The court refused to grant the motion.

Cases in different jurisdictions were mentioned in which judgments were vacated after the term at which they were rendered, and it was said concerning them: "It is questionable whether the principle that underlies these and similar decisions goes farther than to warrant the vacating of judgments for want of jurisdiction after more than a year has elapsed from the time of their rendition in cases where the particular questions involved in the motion to vacate had not been considered by the court in rendering the judgment." Further discussing the matter, it was said: "If the court in this case erroneously decided that it had jurisdiction, it can no more vacate its judgment for

such error than for any other.” It was finally said: “We hold that the decisions of this court on a question of its own jurisdiction, which it is competent to decide and which no other court has the power to review, are binding in whatever pertains to the action in which they are made, and the judgment therein valid and conclusive, however the court may decide the same question in other cases.”

Stress was laid on the circumstances that the court was one of last resort, and the sole judge of its own jurisdiction, and that the question raised on the motion to vacate its judgment for want of jurisdiction was considered by the court in the rendition of the judgment.

In Freeman on Judgments, section 98, it is said: “Where an appellate court has deliberately determined that it had jurisdiction over the subject-matter of an action, it will perhaps refuse, at a subsequent term, though convinced that its former conclusion was erroneous, to vacate its judgment for want of such jurisdiction.” Citing *State v. Waupaca Co. Bank*, 20 Wis. 672. “Unless this exception be sustainable, we believe the decided preponderance of authority justifies, or rather requires, a court, on motion being made to vacate its judgment because it was without jurisdiction over the person or the subject-matter, to inquire whether such was the fact, and if so, to grant the relief sought.”

It is further said, in the same section: “Judgment having been entered in an apparently legal manner, and the jurisdiction of the court not being retained by any motion or proceeding taken either during the term or within the time allowed by some statute, the court loses all control over the action and the parties thereto, and its subsequent interference to vacate its judgment can only be justified on the ground that the

judgment might be avoided in any collateral proceeding, and for that reason to permit it to stand unvacated may probably cause innocent parties to purchase titles based thereon, or to be otherwise deluded by it."

The jurisdiction of this court is wholly appellate, with the auxiliary jurisdiction needed for the proper exercise of appellate jurisdiction. It is a court of last resort in the causes in which it has jurisdiction, but its jurisdiction is defined by statute, and in any case where the constitutionality of a statute is in question and such question is duly presented it has not jurisdiction, though it be a cause in which it would have jurisdiction if such question were not so involved.

If a case brought to this court from a trial court be found to be thus within the jurisdiction of the Supreme Court, this court has no authority except to cause it to be duly certified to the Supreme Court, and if, instead of doing so, this court should proceed to determine the cause and should affirm or reverse the judgment of the court below, the judgment of this court would be void. .

If it be properly shown to this court that it has rendered a judgment which is void, a proper concern for its own dignity, as well as a due regard for the rights of the parties and for the preservation of the reverence in which the law should be held by all men, should induce the court to set aside its invalid decision, if it can find a way to do so without departing from established rules of law.

The fact that the judges of this court as now constituted did not participate in the decision here in question, of which mention is made in the brief filed with the petition, or motion, can not affect the question one way or the other, as we regard it. The court is the same, and the same consideration should con-

trol us as would properly have weight with our predecessors, if they still occupied the bench. Our authority in the premises certainly is not greater than would be their authority if they were yet in office.

After a cause has been decided by this court, the record and papers, including the briefs of counsel, remain on file in the custody of the clerk.

In the brief upon the motion before us, reference is made, in support of the application, to the briefs, especially to the petition for a rehearing and the brief in support thereof.

It is a firmly established rule of this court, as it is also of the Supreme Court, that any question not presented in the briefs is regarded as waived. Another well established rule is, that no question is entitled to notice on petition for a rehearing which was not presented on the original hearing. These rules are so familiar that reference to authorities is not needed.

Therefore, we will not examine, judicially, the contents of the brief on petition for a rehearing.

We have concluded, however, that we may look, not only to the opinion delivered on the original hearing, but also to the transcript of the record and the briefs upon the original hearing, so remaining on the files of this court, to ascertain whether the constitutionality of a statute was in question, and such question duly presented on the original hearing.

It was an action to enforce the statutory lien of an assessment for the improvement of a street abutting for its entire length upon the right of way of the railroad company; and the amount for which judgment was rendered was \$1,480.00

This court is, by the statute, given jurisdiction "in all cases for the foreclosure or enforcement of liens of purely statutory origin where the amount in contro-

versy does not exceed the sum of thirty-five hundred dollars," section 1337, Burns' R. S. 1894.

Of course the mere fact that the defendant appeared and resisted the enforcement of the statutory lien did not cause the constitutionality of the statute under which the assessment was made to be in question and such question to be duly presented, so as to deprive this court of jurisdiction of the cause on appeal.

We do not observe any indication in the record of the court below, that the resistance was based upon an assertion of the unconstitutionality of the statute.

In the first brief for the appellant on the original hearing it is said: "Dunkirk, at the time this work was done, was an incorporated town. The proceedings were instituted by the board of trustees, without petition. Before considering the validity of the proceedings, the point is made that the statute does not contemplate making the right of way of a railroad company liable for such improvements. It is only on the theory that abutting property is enhanced in value, that the power to tax it can be given. The statute must be construed in the light of the theory of its enactment. When its provisions are attempted to be applied to an interest in real estate that can in no sense be profited thereby in any instance, it becomes evident that the statute was not intended to include it, and such, it is claimed, is the right of way of a railroad. * * * There is no equitable reason why the right of way, the value of which can in no sense be increased by such improvement, should be made liable for street improvements. If liable, it must be because the statute has so provided, and that the legislature had the right to so enact. This proposition we deny. Private property can only be taken for a public purpose upon just compensation being given. When, therefore, there can be no compensa-

tion there can be no taking. It is a fact beyond controversy that the improvement of the street abutting on the right of way of a railroad can, in no sense, benefit the railroad."

Unless this language, quoted from the first brief, can be held to raise and properly present the question of the constitutionality of the statute, that question was not involved up to that stage of the case.

According to this argument in the brief, if it could be held (as was held by this court) that the improvement was beneficial to the railroad, the statute would be valid, and it would not be necessary to decide as to its constitutionality, but it would be invalid if the improvement was not beneficial to the railroad.

In the answering brief for the appellee, it was claimed that this contention on behalf of the appellant was overthrown by the case of *Peru, etc., R. R. Co. v. Hanna*, 68 Ind. 562.

In the appellant's reply brief the case last mentioned was criticised, and it was said, that "it would be of little weight in this court but for the fact that it is bound to accept the decisions of the Supreme Court, except that when such decisions do not meet its approval, it may refer the question to the Supreme Court for reconsideration; which we ask may be done in this case should this court find that such decision stands in the way of reversal."

There was no request or suggestion on the original hearing that the cause be transferred to the Supreme Court, except the conditional request above quoted.

There was further insistence in the reply brief that the improvement could not be regarded as beneficial to the railroad, and it was contended that the statute did not contemplate a personal judgment; that a decision that a personal judgment may be rendered can not stand except the statute itself be disregarded; and

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that the rendition of a personal judgment to satisfy a statutory lien is unconstitutional. This was, in effect, a contention that the rendition of a personal judgment was contrary to the statute, and not a contention that the statute was unconstitutional.

If it be proper for us to look thus to the briefs, still we are unable, from the examination of them, to determine that the judgment of this court under consideration was void for want of jurisdiction of the subject-matter.

The motion is overruled, with costs.

SNODDY v. WABASH SCHOOL TOWNSHIP OF
FOUNTAIN COUNTY.

[No. 2,056. Filed March 18, 1897.]

SCHOOL TOWNSHIPS.—*Powers of Trustee Limited to Those Delegated by Statute.*—*Attorney's Fees.*—A school township cannot be held liable upon an attorney fee clause in a note. The powers of trustee to make contracts being limited to those granted by statute.

From the Fountain Circuit Court. *Affirmed.*

Lucas Nebeker and D. W. Simms, for appellant.

C. M. McCabe, for appellee.

COMSTOCK, C. J.—Appellant brought this suit against appellee to recover the amount due on certain notes or warrants executed by defendant township to J. L. Townsley, payee, and by said Townsley endorsed to plaintiff. The warrants contained an unconditional promise to pay attorney fees. Upon request of plaintiff the court made a special finding of the facts and conclusion of law thereon.

In its conclusion of law the court below held that

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the plaintiff was not entitled to recover of the defendant any sum for attorney fees.

The sole question presented to this court is, "May a township which has executed its note in usual form providing for attorney fees for a valid debt which it had the power to incur, be held liable upon an attorney fee clause contained therein?"

Appellant contends that a township stands upon the same footing with any other corporation; that the general law upon which the township depends for its existence clothes it with power to purchase school supplies or any other article necessary to carry on its business, and it has the power to execute its promissory note in payment therefor, precisely the same as an individual or a private corporation; that unless there is a special statute restricting the powers of townships, concerning the execution of its promissory notes, it must be held liable upon an attorney fee clause contained in such note the same as a private corporation or an individual.

Appellee contends that this position is not supported by authority. The precise question presented has not, so far as we are advised, been passed upon in this State. There have been cases based upon notes and warrants issued by township trustees in which there were stipulations to pay attorney fees, but in these cases the authority of the trustees to agree to pay attorney fees was not questioned, and they serve only to show a practice.

Section 5920, Burns' R. S. 1894, delegates to township trustees the power to employ teachers, establish and locate schools, build and provide suitable houses, furniture and other articles and educational appliances necessary for the thorough organization and efficient management of said schools.

Upon this statute and the decision of the Supreme

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Court, in *Sheffield School Tp. v. Andress*, 56 Ind. 157, based thereon, appellant chiefly relies to maintain his position. The warrant sued on in that case bore ten per cent. interest and provided for the payment of attorney fees. The court, in speaking of the power in corporations to make contracts *intra vires*, say: "Always, they could make necessary and proper contracts, in respect to the business legitimately arising within the scope of their corporate powers. Always, they could make them in writing, and, formerly, could, at common law, make them only in writing; and yet they could not make a promissory note. This was not because they could not give an obligation to pay a debt, but because corporations, at common law, could not make a parol contract, and, at common law, a promissory note is a parol contract. * * * Municipal and *quasi* corporations can make, in a proper case, a promissory note. * * * But the narrower question is made in this case, could the appellant, viz., Sheffield School Township, execute the notes sued on in this case? Being payable out of a particular fund, they are not commercial paper, and their assignment could cut off no defense, in the hands of the assignee." Citing *Hays v. Gwin*, 19 Ind. 19; *Johnson v. Seymour*, 19 Ind. 24. "An individual could have legally executed them. They are within the law of this State. They stipulate for a legal rate of interest, and for attorney fees within the statute. * * * We think it was within the discretion and power of the corporation to give the notes in accordance with these terms."

The only question the court was called upon to, and did decide was, in the language of Perkins, C. J., in delivering the opinion, "Can a school township execute a valid promissory note in consideration of a liability incurred in building a schoolhouse?"

It has, since said decision was rendered, been held

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by our Supreme and Appellate Courts in several cases, that when a debt has been lawfully contracted by a township trustee he has the necessarily resulting power of giving a creditor a proper written acknowledgment and promise to pay. A note or other obligation executed by the trustee does not bind the school corporation, for it is only bound when the school supplies are actually furnished.

“The law intends that where property is sold, on credit to school corporations, they shall only be held for the fair and reasonable value of the property received. Parties who deal with school corporations are bound to know the limitation placed upon them by law.” See *Noble School Furniture Co. v. Washington School Tp.*, 4 Ind. App. 270, and authorities there cited.

These cases go only to the proposition that in some form the trustee may acknowledge, in writing, the obligation to pay a valid debt of the township.

Upon the subject of the promises of school townships, the Supreme Court, in *Honey Creek School Tp. v. Barnes*, 119 Ind. 213, says: “School townships are corporations with limited statutory powers, and all who deal with a trustee of a school township are charged with notice of the scope of his authority, and that he can bind his township only by such contracts as are authorized by law.” Citing *Recve School Tp. v. Dodson*, 98 Ind. 497; *Union School Tp. v. First National Bank*, 102 Ind. 464; *Axt v. Jackson School Tp.*, 90 Ind. 101; *Bloomington School Tp. v. National School Furniture Co.*, 107 Ind. 43. “Private corporations, organized for pecuniary profit, may, like individuals, borrow money whenever the nature of their business renders it proper or expedient that they should do so, subject only to such express limitations as are imposed by their charters. The power to borrow carries

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with it, by implication, unless restrained by the charter, the power to secure the loan by mortgage. Accordingly it may be regarded as settled, that where general authority is given a corporation to engage in business, and there are no special restraints in its charter, it takes the power as a natural person enjoys it, with all its incidents and accessories; it may borrow money to attain its legitimate objects, precisely as an individual, and bind itself by any form of obligation not forbidden." *Wright v. Hughes, Assignee*, 119 Ind. 324.

We do not understand that the same rule applies to a school township or other *quasi* municipal corporations. They are held to the exercise of the limited powers conferred by statute. The cases herein cited holding that valid acknowledgments of debts and promises to pay, executed by the trustee are lawful, also hold that such written instruments only bind the school corporation when the school supplies are actually furnished. They do not preclude the school township from proving the actual or true value of the property purchased by the trustee. Trustees may acknowledge and promise to pay a debt incurred in the purchase of property they had authority to buy, but, in our opinion, neither the statutes of our State nor the decisions cited can be construed as giving them authority to enter into a contract of indemnity, in the form of a promise to pay attorney fees, for the enforcement of such acknowledgment or promise. The trustee is not obliged to incur an indebtedness; he need not buy until he has the funds with which to pay; he need give no written obligation to pay, and unless clearly authorized to do so by law he should not have authority to bind the school township for payment of anything but the property it actually receives.

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Appellee cites as in point, *Weir Furnace Co. v. Independent School Dist. of Seymour, etc.* (Ia. Sup.), 68 N. W. 584. It was an action against a school district for supplies. The court held that a school board has no power in the absence of express legislative authority to make a contract for school supplies which stipulates for the payment of attorney's fees by the school district. Deemer, J., speaking for the court, says: "Now, it has been held, and as we think correctly, that a school board or other *quasi* municipal corporation has no right to make a contract fixing the place of payment at any other place than its treasury, without special legislative authority. * * * It seems clear to us, also, that as the school district is a creature of the statute, and has no authority, save that which is expressly conferred upon it, its board of directors have no power to contract to pay attorney's fees."

Counsel for appellant insist that the expression above quoted is *obiter dictum*—that the question was not involved in the case—that, being a decision of a foreign state, it has here no binding force. While it is not binding as an authority in Indiana, yet it is the expression of the supreme court of Iowa directly upon the question in the case at bar, and is based upon the proposition recognized in all the authorities that a school district is a creature of the statute and of limited powers. We know of no authority to the contrary. The statute does not give the power to the trustee, and, in our opinion, it is not to be inferred.

Judgment affirmed.

HENLEY, J., dissents.

Thompson *et al.* v. Shewalter *et al.*

THOMPSON ET AL. v. SHEWALTER ET AL.

[No. 1,689. Filed March 19, 1897.]

PLEADING.—*Time for Filing Answer.*—*Discretion of Court.*—Where an action is brought, and defendants enter their appearance, and the cause is continued from term to term for more than two years, it is within the discretion of the court to permit defendants to file an answer, it not appearing that defendants objected to any of the numerous continuances, nor that they ever asked that a rule be entered requiring defendants to answer.

SAME.—*Answer of Garnishee.*—*Sufficiency Of.*—The answer of a garnishee, summoned as a judgment debtor of defendant, averring that the judgment had been compromised and settled, and entered satisfied in the proper court, *prima facie* shows that the garnishee defendant is not indebted to the attachment defendant on the judgment.

SAME.—*Garnishment.*—*Refusal to Permit Answer After Default.*—Where in a garnishment proceeding the principal defendant entered her appearance and asked that a default taken against her be set aside and that she be permitted to answer, plaintiffs having filed their written consent, the refusal of the court to permit the filing of the answer is not prejudicial to the plaintiffs.

APPEAL AND ERROR.—*Bill of Exceptions.*—*Longhand Manuscript of Evidence.*—The record must affirmatively show that the longhand manuscript of the evidence was filed in the clerk's office before it was incorporated in the bill of exceptions.

From the Blackford Circuit Court. *Affirmed.*

Cantwell & Simmons, Ryan & Thompson, Thompson & Canaday and *W. H. Williamson*, for appellants.

D. H. Fouts, A. Waltz and *J. M. Smith*, for appellees.

ROBINSON, J.—This action was brought by William A. Thompson, Albert O. Marsh, and Joseph W. Thompson on account, for attorneys' fees, for services rendered the appellee, Consedine. At the same time attachment proceedings were begun and the appel-

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lees, James A. and Elias Shewalter, were summoned to appear and answer in garnishment. Appellants, Williamson and Walters, began suit on an account of the same character, and filed under in the attachment proceedings; affidavits for attachment and garnishment were by them duly filed. Appellee, Consedine, was defaulted. Appellee, Elias Shewalter, filed his verified answer in two paragraphs to the attachment and garnishment proceedings, and the appellee, James A. Shewalter, filed an answer in four paragraphs. Separate demurrers were filed to the several affirmative paragraphs of answer, and overruled. After the default of the appellee, Consedine, she appeared in court and asked that she be permitted to file an answer, and to this request all the appellants consented in writing, but the court refused to set aside the default, and refused to permit the filing of the answer. Upon a trial by the court, judgment was rendered in favor of the appellees, Elias and James A. Shewalter, against the appellants for costs, and in favor of appellants against appellee, Consedine, in a named sum.

The errors assigned are: Overruling appellants' motion to default appellees, Elias and James A. Shewalter; refusing to set aside the default of the appellee, Consedine, and in refusing to permit her to file her answer; overruling the demurrers to the second, third, and fourth paragraphs of the separate answer of James A. Shewalter, and the demurrer to the second paragraph of the separate answer of Elias Shewalter; and overruling the motion for a new trial.

It appears that in 1887, appellee, Consedine, recovered a judgment in the Jay Circuit Court against the appellee, James A. Shewalter, for \$1,000.00. After this judgment was affirmed by the Supreme Court, it was paid. After the trial of the above case, the appel-

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lee, Consedine, recovered another judgment against appellee, James A. Shewalter, in the Jay Circuit Court for \$1,700.00, and this judgment was affirmed by the Supreme Court. The appellants were the attorneys for the appellee, Consedine, in the prosecution of the above cases. Appellee, Elias Shewalter, was surety on the appeal bond in each of these cases. After the trial of these cases, and during the pendency of the appeal in the second case, the appellee, Consedine, removed to the state of West Virginia, where she resided for some time. After the judgment in the second case was affirmed by the Supreme Court, a petition for a rehearing was filed, and during the pendency of that petition the appellee, James A. Shewalter, procured from the appellee, Consedine, a written satisfaction and release of the judgment. While appellee, Consedine, still resided in West Virginia, the present action was brought in the Blackford Circuit Court, where the Shewalters lived, to recover the value of the services of the appellants as such attorneys for appellee, Consedine, in the two cases against appellee, James A. Shewalter.

The first error complained of is the overruling of appellants' motion to default the appellees, James A. and Elias Shewalter.

The complaint in this case was filed on the 14th day of May, 1891, and on the 16th day of the same month summons was served on appellee, James A. Shewalter, and on the 18th day of the same month Elias Shewalter was served with summons. On the 2d day of June following, the following entry was made in the cause: "Come now the parties by counsel and by agreement this cause is continued until the next term of this court." On the 26th day of October, 1891, the cause was again continued by agreement of counsel. The cause was continued from term to term, and on

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the second judicial day of the November term, 1893, of the Blackford Circuit Court the cause was again continued, but on the 9th judicial day of the same term of court appellants appeared and the last continuance was set aside and the appellee, Consedine, was defaulted, and at the same time the court overruled appellants' motion to default the other appellees.

In this ruling there was no error. There had been an appearance by these appellees, and while the cause had been continued from term to term for more than two years, it does not appear that appellants ever objected to any of the numerous continuances, nor does it appear that they ever asked that a rule be entered requiring these appellees to answer. It does not appear why the case was so often continued, but the reasons for such continuances were known to the trial court. There is nothing in the record which removes the presumption that the trial court rightfully exercised its discretionary power in allowing time to file pleadings by a party who had already entered an appearance. Elliott's App. Pract., section 606. •

Error is assigned on the overruling of the demurrers to the answers of appellees, Shewalter and Shewalter.

The second paragraph of the answer of appellee, Elias Shewalter, sets up the recovery of the judgment in the Jay Circuit Court by Consedine against James A. Shewalter for \$1,700.00; the appeal and affirmance of the judgment; that Elias Shewalter signed and executed as surety for James A. Shewalter a bond for stay of proceedings pending the appeal; that within sixty days after the affirmance of the judgment by the Supreme Court, and before the sixty days expired, namely, on the 13th day of May, 1891, the appellees, Consedine and James A. Shewalter, compromised and settled said judgment in the Jay Circuit Court, and

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the same was entered satisfied in that court, and that the same was compromised and settled before this cause was begun in this court, and before this defendant had any notice of any attachment or garnishee proceedings; that the entry of satisfaction of said judgment is in full force in said Jay county, and that this defendant is not otherwise indebted to the attachment defendant, Consedine, in any manner whatsoever.

The second paragraph of the answer of appellee, James A. Shewalter is a plea of payment, which appellants concede is good.

The third paragraph of answer of the same appellee is the same in substance as the second paragraph of answer of appellee, Elias Shewalter.

We are unable to see any material difference between the third and fourth paragraphs of the answer of James A. Shewalter.

The rulings on the demurrers to these several answers may all be considered together, as the same objection is urged against each paragraph, and that is, that there is no allegation that the judgment recovered by appellee, Consedine, against the appellee, James A. Shewalter, for \$1,700.00 was ever paid. The allegation is that the parties "compromised and settled said judgment in the Jay Circuit Court, and the same was entered satisfied in the said Jay Circuit Court, and that the same was compromised and settled before this cause was begun in this court, and before this defendant answering had any notice of any attachment or garnishee proceedings."

We do not think these answers are open to the objection urged by appellants. The allegation that the judgment has been compromised and settled, and that it had been entered satisfied in the proper court, *prima facie* shows that the garnishee defendant is not in-

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debted to the attachment defendant on that judgment. If the attachment defendant had caused to be entered a satisfaction of the judgment she could not insist, as long as that record stood, that the judgment had not been paid. The appellants were asking, in so far as any claim owing by the garnishee to the attachment defendant was concerned, that they be placed in the attachment defendant's place. Whether a valid claim existed or whether it had been compromised and settled, and whether the acts done by the parties amounted to a settlement, could be determined only by the proof. When it is said that a judgment has been entered satisfied in the proper court, the presumption is that it was fully paid, and that presumption must control until the satisfaction is properly set aside.

This being a special proceeding and largely controlled by statute, it would seem that under sections 834 and 953, Burns' R. §. 1894, the special answers filed were unnecessary. But if they were necessary they amount to a denial of the matter set out in the affidavits for garnishment, and are good against a demurrer. See *Corbin v. Goddard*, 94 Ind. 419.

The statute gave appellants the right to require the garnishees to make disclosures of any indebtedness owing by the garnishees to the attachment defendant, and it appears an order was made requiring the garnishees to appear, on a day named, to be questioned as to that matter, but it does not appear that the appellants availed themselves of the order, and no inquiry was made of the garnishees until the trial.

The case of *Hogan v. Burns* (Cal.), 33 Pac. 631, cited by appellants' counsel, was a suit on certain promissory notes, and among the answers filed was one in which the defendant denied that the notes had not been paid, but alleged that they had been "satisfied

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and discharged." An account, order, and acceptance were offered in evidence, and excluded. The court held that while an accord and satisfaction had not been pleaded, yet, conceding that they were, it was not error to exclude the account, order, and acceptance from the evidence, in the absence of any offer to show by other evidence that they were intended or accepted as satisfaction of either of the notes, or that either the account or order had been paid.

But in the case at bar, the appellants can have no greater rights than the attachment defendant, and, in a suit by her on the judgment, an answer that the judgment had been compromised and settled and had been entered satisfied in the proper court, would be good.

The record affirmatively shows that the court had jurisdiction of the person of the appellee, Consedine. After she was defaulted she appeared in person, and appellants filed their consent in writing that the default might be set aside and that she might be permitted to file an answer, and at that time she asked that the default be set aside and that she be permitted to file her answer, which the record shows was the general denial. It is argued that the court erred in refusing to set aside the default and permit the filing of the answer. It is true, the garnishee defendants had the right to require the appellants to show that the court had jurisdiction of the person of the attachment defendant. The record shows that the court had such jurisdiction. We are not informed how the rights of the appellants were prejudiced by this ruling.

The remaining error discussed by counsel is overruling appellants' motion for a new trial. The grounds upon which a new trial was asked were that the finding and judgment of the court as to the garnishee is

contrary to the law and the evidence, and that the court erred in the admission of certain evidence offered by appellees, and in refusing certain evidence offered by appellants.

It is argued by counsel for appellees that the evidence is not in the record.

It appears that the longhand manuscript of the evidence was filed in the clerk's office on the 17th day of October, 1894, and that on the same day the bill of exceptions was signed by the judge and filed. It thus appears that the record does not show that the longhand copy of the evidence was filed in the clerk's office before the bill of exceptions containing the same was signed by the judge.

The transcript contains the following entry: "And afterwards, on October 17, 1894, and within the time allowed by the court, the plaintiffs filed in the office of the clerk of this court their bill of exceptions, which bill of exceptions is in the words and figures following." This is followed by the longhand manuscript of the evidence, containing the file mark of the clerk that it was filed October 17, 1894. The judge signed the bill of exceptions on the same day. There is no other evidence of the filing of the longhand manuscript, except that in his certificate to the transcript the clerk says: "I also certify that on the 17th day of October, 1894, the official stenographer who took down the evidence in said cause, filed in my office his longhand manuscript thereof, which is the same manuscript of the evidence incorporated in the bill of exceptions and made a part of the foregoing transcript." From these entries it is evident that the longhand manuscript of the evidence was not filed in the clerk's office before it was incorporated in the bill of exceptions, or before the bill was filed, as required by section 1476, Burns' R. S. 1894 (1410, R. S. 1881). *Carl-*

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son v. State, 145 Ind. 650; *Rogers v. Eich*, 146 Ind. 235; *Manley v. Felty*, 146 Ind. 194; *De Hart v. Board*, 143 Ind. 363; *Hamrick v. Loring* (Ind. Sup.), 45 N. E. 107; *Beatty v. Miller*, 146 Ind. 231; *Fitzmaurice v. Puterbaugh*, *post*, 318.

The evidence is not in the record.

We find no error in the record for which the judgment should be reversed.

Judgment affirmed.

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[No. 2,114. Filed March 30, 1897.]

BILLS AND NOTES.—*Material Alteration of Note.*—To change the payee of a note without the consent of the maker is a material alteration and avoids the note.

SAME.—*Words Descriptive of Payee.*—*Immaterial Alteration.*—The insertion of the words "Guardian of P. Malcom" immediately following the name of the payee of a note does not constitute a material change thereof; the words being only a description of the person.

SAME.—*Guardian.*—*Transfer of Note by Delivery.*—*Action by Transferee.*—Where a guardian transfers, by delivery without indorsement, to the heirs of his deceased ward, as a part of the ward's estate, a promissory note payable to him, the heirs of deceased ward may maintain an action against the makers of the note if the original payee is made a party defendant and files a disclaimer.

From the Vigo Superior Court. *Affirmed.*

J. E. Piety, J. O. Piety, W. Mack and G. M. Crane, for appellants.

S. C. Davis, F. Turk, G. W. Kleiser and J. H. Kleiser, for appellees.

COMSTOCK, C. J.—The complaint, in substance, alleges that on January 10, 1879, one John H. Rippetoe.

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who was guardian of Peter Malcom, a person of unsound mind, loaned to appellant, Casto, \$200.00 of his ward's funds and took therefor a note executed by appellants, Casto and Wiseman; that the note was made payable to John H. Rippetoe as guardian of Peter Malcom; that the said ward died in 1891; that his estate was duly settled, and that thereafter Rippetoe delivered, without written assignment, the note to plaintiffs, who are the only heirs of the said ward, and who sue in this action as such heirs. The note is made an exhibit. Rippetoe was made defendant to answer as to his interest. Casto and Wiseman, in their separate answers, each set out the note, which they allege they did, in fact, sign January 10, 1879, the payee therein being John H. Rippetoe. They allege that, in this contract with Rippetoe, he acted in his individual capacity, and not in his capacity as the guardian of Peter Malcom; that they did not know, nor had they any reason to believe, that the money loaned to Casto was trust money until 1894, a short time before this suit was filed; that the note was written with pen and ink, and that no blank spaces were left thereon; that after the note had been delivered, some one, without their knowledge or consent, materially altered and changed said note by inserting and interlining after the name of the payee in said note, the words "Guardian of P. Malcom," and that the note in its altered condition is the one sued on in this action. Wiseman also pleads surety.

To these answers the plaintiffs demurred. The demurrers were sustained and exceptions taken. Defendants refusing to plead farther, judgment was rendered against Casto and Wiseman for the amount of the note, saving Wiseman's rights as surety.

The only errors assigned are the sustaining of the demurrers to the second paragraph of Casto's separate

answer, and the amended second paragraph of Wiseman's separate answer.

The question for decision here is, whether the adding of the words "Guardian of P. Malcom" changed the payee of the note from Rippetoe, individually, to Rippetoe as guardian. In other words, from Rippetoe, to the estate of Peter Malcom.

An alteration made after the execution of an instrument is presumed to be made by the party claiming under it. *Bourman v. Mitchell*, 79 Ind. 84; *Cochran v. Nebeker*, 48 Ind. 459; *Palmer v. Poor*, 121 Ind. 135.

The presumption is, then, that the alteration was made by the plaintiffs. A material alteration of the note by the payee, without the consent of the maker, renders such note void. *McCoy v. Lockwood*, 71 Ind. 319; *Coburn v. Webb*, 56 Ind. 96; *Palmer v. Poor*, *supra*; *Cochran v. Nebeker*, *supra*.

But if the alteration is an immaterial one, the payee, or holder, may recover, though such alteration is made by himself. *Kingan & Co. v. Silvers*, 13 Ind. App. 80; 1 Am. and Eng. Ency. of Law, p. 501.

To change the payee of the note, without the consent of the maker, is material, and avoids the note. *Grimes v. Piersol*, 25 Ind. 246; *Piersol v. Grimes*, 30 Ind. 129; *State, ex rel., v. Polke*, 7 Blackf. 27; *Hodge v. Farmers' Bank*, 7 Ind. App. 94; 1 Am. and Eng. Enc. Law 506.

Many other decisions might be cited to the same effect.

Counsel for appellants contend that the insertion of the words "Guardian of P. Malcom" after the name of Rippetoe changed the payee from Rippetoe, individually, to the estate of Peter Malcom.

Appellees contend that the words "Guardian of P. Malcom" are *descriptio personae*, and that the note is still payable, by its terms, to Rippetoe individually;

that these words being only descriptive of the person, their insertion is not a material change.

In the case of *Helm v. Van Vleet*, 1 Blackf. 342, the cause of action was a written obligation, by which the defendant promised to pay one Van Vleet, administrator, etc. One of the grounds upon which the judgment was complained of was "first, because the plaintiff, in his declaration, styles himself administrator, and sets out a contract made with himself." The court says: "If an administrator change the nature of a debt, originally due to the intestate, by a contract made with himself, he must sue for the new debt in his own name, and not in his representative character. * * In this case the plaintiff declares on a promise made to himself, and the judgment is in his own name. His styling himself administrator may be considered as only a *descriptio personae*, and does not change the nature or effect of the action, or of the judgment." See, also, *Savage v. Meriam*, 1 Blackf. 177.

In *Capp v. Gilman*, 2 Blackf. 45, plaintiff sued upon a promise made to himself in favor of himself. In his petition he named himself as administrator. The word "administrator" was surplusage or *descriptio personae*.

Speelman v. Culbertson, 15 Ind. 441, was a "suit by Culbertson, against the appellants, upon a promissory note made by Speelman and Fox to Lewis Bocock and Francis Helm, administrators of the estate of John Bocock, deceased. The payees transferred the note, by delivery, to the plaintiff. * * * The note was given for money, belonging to the estate of deceased, lent by the payees to the makers thereof. It was given to Bocock and Helm, and the words 'administrators,' etc., may be regarded as merely descriptive of the persons." It was objected that the administra-

tors could not transfer the note. The court held that they could make a valid transfer in their own right.

In *Shepherd v. Evans*, 9 Ind. 260, in a suit upon a promissory note payable to James L. Evans, guardian of the estate of George Rector, it was contended that Rector was the real party in interest and that Evans could not sue. The court held that the words, "guardian of the estate of George Rector," may be regarded as surplusage or as *descriptio personae*. Citing *Capp v. Gilman*, *supra*, and *Barnes v. Modisett*, 3 Blackf. 253.

In *Barnes v. Modisett*, *supra*, the defendants below made a note in writing, payable to James Barnes, administrator, etc. After the note became due, Barnes brought suit on it as administrator. The court held that the debt was due the plaintiff in his personal capacity, and not *in autre droit*, and he might be sued and he might sue in his own right without describing himself as administrator, etc., and his having named himself as administrator in the note and in the action was surplusage. Citing *Savage v. Meriam*, *supra*; *Talmage, Admr., v. Chapel*, 16 Mass. 71; *Biddle, Admr., v. Wilkins*, 1 Peters 686.

Numerous cases might be cited from the reported decisions of our Supreme Court in line with those already referred to, to the effect that words annexed to the name of a party to a written instrument are *descriptio personae*.

The case of *Jackson School Tp. v. Farlow*, 75 Ind. 118, treats of the subject more fully than the earlier cases. The opinion of the court is given by Elliott, J., and after citing a number of cases, this language is used: "In all of these cases the rule is broadly declared, that words following the names of parties operate only as mere *descriptio personae*, and it is well settled that such words serve only to identify the parties. This is the doctrine applied to contracts with administrators,

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trustees, receivers, sheriffs, agents, and assignees, and to licensed apothecaries. * * * It makes no difference whether the descriptive words are simply appended to the signature at the foot of the contract or annexed to the name in the body of the instrument."

See, also, the authorities therein cited. To the list of administrators, trustees, receivers, sheriffs, agents, etc., under authority of *Shepherd v. Evans, supra*, the court could properly have added "guardians."

The later decisions of *State v. Helms*, 136 Ind. 122, and *Hodge v. Farmers' Bank, supra*, are not inconsistent with the doctrine announced in the foregoing cases.

In the last named case the court held that a note delivered by a surety, with all blanks filled, including blank for payee, who is named merely as an individual, cannot afterwards be altered, without the surety's consent, by writing "cashier" after the payee, thus making it payable to a bank. The court in that case conceded the law to be that a mere descriptive appellation did not in any way affect a note, but held that "As to banks, the act of the cashier is the act of the bank, and that a bank may sue upon a note payable to its cashier, as such, just as though it were payable to it by its corporate name. * * *

"That the law thus established as to banks and bank cashiers is an exception to the general rule as laid down in cases cited by appellee and referred to above, may be conceded, but that the exception, created doubtless from a deference to commercial necessities and usages, is thoroughly established and generally recognized, is, we think, unquestionable."

"Any change in the terms of a written contract which varies its original legal effect and operation, whether in respect to the obligation it imports; or to its force as matter of evidence, when made by any

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party to the contract, is an alteration thereof, unless all the other parties to the contract gave their express or implied consent to such change. And the effect of such alteration is to nullify and destroy the altered instrument as a legal obligation." Daniel, Neg. Inst., section 1373.

Under these decisions, and the above citation from an approved text writer, how was the legal effect of the note in suit varied by the alteration set out in the answer?

It would have been competent for Rippetoe to have brought suit in his individual capacity. Had he sued as guardian, the word "guardian" would have been treated as descriptive of the person.

Appellants gave their note to the payee as an evidence of the indebtedness of that amount of money, alleged in the complaint to have been a part of the estate of the ward of the payee. These answers admit the execution of the note as set out in the complaint, with the exception of the words, "Guardian of P. Malcom." Unless this is a defense, no defense is made. Appellants' counsel, in their able brief, assert that they are, by this alteration, deprived of any set-off they might have against Rippetoe individually.

The note was not commercial. In the hands of the present holders, under the decisions cited, it was subject to any defense appellants may have had against Rippetoe individually.

In *Robertson, Admr., v. Garshwiler, Gdn.*, 81 Ind. 463, cited by appellants, appellee, a guardian, sued upon a promissory note made by Amos and Emily Birchard, payable to order of appellee at a bank in this State, and endorsed by the appellant, Piel. The makers of the note having both died, appellant, Robertson, was appointed administrator of the estate of the said Emily, and in that capacity was made defendant. Robert-

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son pleaded as a set-off an individual obligation of plaintiff, Garshwiler, and to this the Supreme Court held a demurrer was properly sustained.

In our opinion, this decision does not support the position of appellants, the pleadings showing an entire want of mutuality.

Appellants contend that as the note was executed it was the individual property of Rippetoe. Being his property, it did not descend to the heirs of the ward Malcom; that it could descend to the heirs of Malcom only by changing the payee from Rippetoe to the estate of Malcom; and that it follows that the plaintiffs had no title, and therefore no right of action, or that the payee of the note was changed by the addition of words making a material alteration.

The complaint avers that the note was assigned to plaintiffs by delivery. The answer of Rippetoe disclaims any interest therein, and the possession of the plaintiffs, *prima facie* shows title in plaintiffs.

There is no error. Judgment affirmed.

ALFRED SHRIMPTON & SONS, LIMITED, v. KEYES.

[No. 2,147. Filed March 30, 1897.]

APPEAL AND ERROR.—Rules of Appellate Court.—Paging of Transcript.—Marginal Notes.—Rule 30 of the Appellate Court requiring transcript to be paged and the lines of each page numbered, and requiring marginal notes to be placed on the transcript indicating the several parts of the pleadings, etc., is a reasonable rule and should be strictly observed; though a failure to make marginal notes is not a cause for dismissal.

SAME.—Rules of Appellate Court.—Briefs.—Waiver of Errors.—Appellant waives all errors assigned by his failure to comply with the rules of the Appellate Court requiring that his brief shall contain a summary of the points or questions involved with the citation of authorities and an argument based thereon.

From the Miami Circuit Court. *Affirmed.*

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Charles A. Cole, for appellant.

Roscoe Kimple, for appellee.

WILEY, J.—Appellant, a corporation organized and existing under the laws of New York, sued appellee upon an account stated for goods and merchandise alleged to have been sold appellee at his special instance and request. The appellee answered by general denial. Trial by jury and a general verdict for appellee. Appellant moved for a new trial, which was overruled, and appellee had judgment for costs.

The only error assigned is the overruling of the motion for a new trial. The appellant has filed a transcript, or, we should more properly say, has filed what purports to be a transcript of the proceedings below, consisting of probably 75 or 80 closely written and type printed pages, and has not even numbered the pages. Neither does the transcript contain any marginal notes.

Rule XXX, of this court, is as follows: "The appellant shall cause the transcript to be paged and the lines of each page to be numbered. He shall also cause marginal notes to be placed on the transcript in their appropriate places, indicating the several parts of the pleadings in the cause, the exhibits, if any, the orders of the court, and the bills of exceptions. Where the evidence is set out by deposition or otherwise, the names of the witnesses shall be stated in the margin. The appellant shall also note on the margin all motions and rulings thereon, and he shall also note the instructions given and refused in all cases where questions are made thereon."

In his excellent work on Appellate Procedure, Judge Elliott, commenting upon a similar rule of the Supreme Court, says: "The requirements of the rule of which we have given a synopsis are important and

should be obeyed. It has been said that the absence of marginal notes is 'good evidence that counsel have not studied the record,' and there is much truth in this statement. * * * The annotation of the transcript is by no means an unimportant matter, and in many jurisdictions the failure to make proper marginal notes is considered as a cause for dismissal." Elliott's App. Proced., section 204.

We are aware, however, in this State that the failure to make marginal notes is not a cause for dismissal. *O'Neil v. Chandler*, 42 Ind. 471.

The rule which this court has adopted, and which we have above quoted, is a reasonable one and is for the protection and assistance of the court, and it should be strictly observed. When we consider the vast amount of laborious work which devolves upon the court in the examination and study of voluminous records, the reason and necessity of the rule is apparent.

Appellant has filed a paper, endorsed and purporting to be a brief, consisting of less than two pages of typewritten matter, in which rule number XXV of this court is wholly ignored. Nor does it comply with the requirements that "briefs shall be filed in all cases, and they shall refer by page and line to the transcript wherever necessary to a full understanding of the questions discussed. They shall state concisely the propositions relied on. * * * In referring to instructions counsel shall specify the number of the instruction and give the pages and lines of the record where it appears, and shall succinctly state the substance of the instruction, the specific objection to it, where objections are urged. * * * In discussing questions arising on the admission or exclusion of evidence counsel shall refer to the particular testimony and specify by pages and lines the part of the

record where it appears, and shall also state specifically the nature of the evidence and the objections thereto."

Judge Elliott, in his Appellate Procedure, section 440, says: "It is necessary that the appellate tribunal should be fully informed as to the manner in which the questions arise and where and how they are presented by the record. It is not enough to assert that there is a designated question in the record; general assertions are valueless. The manner in which the question assumed to be resented arose is required to be specifically and particularly stated. It is to be constantly kept in mind that the brief should supply the court with information and that the court must be referred to the record to verify the statements of the brief. Not so, but more, for the court is unacquainted with the record, and hence it is incumbent upon counsel to specifically refer to the particular part of the record which exhibits the ruling sought to be brought under investigation. In other words, it is the duty of counsel to acquaint the court with the parts of the record of which examination is desired. The court will not hunt through the record to discover the parts of it which counsel assume exhibit the rulings which they desire considered."

This is an inexorable rule, and it has been enforced in many cases, to some of which we will refer later. The rule seems to be clearly settled in this State that a brief, in addition to the statement of the case, should contain a summary of the points or questions involved, with the citation of authorities, if authorities are relied upon, and an argument based upon both. *City of Anderson v. Neal*, 88 Ind. 317; *McCann v. Rodifer*, 90 Ind. 602; *Arbuckle v. Biederman*, 94 Ind. 168; *Robbins v. Magee*, 96 Ind. 174; *Louisville, etc., R. W. Co. v. Grantham*, 104 Ind. 353.

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The appellant's brief does not possess any of the requirements as indicated by the cases just cited. No argument is attempted; no authorities are cited; and counsel for appellant has not even called our attention to any part of the record, by page or line, where we might find the questions, he merely refers to in his brief. There is no attempt to point out or argumentatively discuss any error in the ruling of the trial court.

In *Chicago, etc., R. W. Co. v. Hunter*, 128 Ind. 213, it was held that a party, to be entitled to have alleged errors considered must do more than merely call attention to them, and assert that they are erroneous. Unless there is at least an attempt at argument or something to indicate wherein they are claimed to be erroneous, aside from mere assertions, they will be considered as waived.

In *Cobb v. Taylor*, 133 Ind. 605, it was said: "That mere assertion of error by appellant in his brief, unsupported by argument or authority, can avail nothing on appeal, as the court will refuse to consider it."

In *Sanders v. Scott*, 68 Ind. 130, one of the causes for a new trial was the admission and rejection of certain evidence. In the brief for appellant, counsel simply said: "The court erred in refusing to admit the following evidence, offered by defendant, relating to rents and profits made by Scott for nine months' use of firm property." Then followed, in his brief, the evidence rejected. Referring to appellant's brief upon that question, the court said: "As to the rejected evidence, there is no reference in the brief to the part of the record in which the supposed error may be found. There is rather a lengthy bill of exceptions in the record, but we do not feel called upon to search through it in pursuit of the supposed error. The portion of the record relied upon should have been pointed out, in compliance with rule XIX of this

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court." The court refused to examine the record, and affirmed the judgment.

In the case of *Louisville, etc., R. W. Co. v. Donnegan*, 111 Ind. 179, it was held that "Parties asking for a reversal of a judgment must furnish references to such portions of the record as will show that errors intervened in the proceedings below."

In *Harlan v. State*, 134 Ind. 339, the Supreme Court, speaking by Olds, J., said: "Counsel, in preparing his brief, should, in referring to matter in the record, give the lines and pages of the record where such matter may be found."

In *Martin v. Martin*, 74 Ind. 207, it was said by the court, Woods, J., delivering the opinion: "No matter what error the court below might have committed, it is not manifest in the record, unless saved in the lower court and presented in this court, in accordance with the rules of practice. . These rules of practice are the law of the land, their reasonableness is justified by experience, and, unless ready to abrogate, we have no right to disregard them. We never go beyond the brief of the appellant to search the record in quest of errors which have not been pointed out in the brief."

As we have before said, the brief of appellant does not comply with the rules of this court, as no argument is attempted, no authorities cited, and no reference is made to the record; and therefore, in harmony with the authorities cited in this opinion, and the uniform practice, we must hold that appellant has waived all alleged errors, and the judgment must be affirmed.

Judgment affirmed.

Brandt et al. v. The State, ex rel. Boyer.

BRANDT ET AL. v. THE STATE, EX REL. BOYER.

[No. 2,194. Filed March 31, 1897.]

INTOXICATING LIQUORS.—*Sale to Husband While Intoxicated.*—*Action on Bond.*—*Amendment of Complaint Pending Trial.*—In an action on the bond of a retail liquor dealer, brought by a wife for damages caused by a sale of liquor to her husband while intoxicated, in violation of section 15 of the act of March 17, 1875 (Acts 1875, p. 55), it was not error to permit plaintiff after the close of the evidence in chief to amend her complaint by inserting the words "State of Indiana on the relation of," immediately before her name in the title, and also in the first line of the complaint. *p. 313.*

NEW TRIAL.—*Joint Motion For.*—There is no error in overruling a joint motion for a new trial which is not good as to all who join in it. *p. 314.*

PRACTICE.—*Amendment of Pleading Pending Trial.*—*Continuance.*—A pleading having been amended pending the trial of a cause it was not error to overrule a motion for a continuance, where the affidavits in support thereof did not show distinctly in what respect the parties asking the delay were prejudiced by the amendment. *p. 315.*

SAME.—*Continuance.*—*Discretion of Court.*—An application for a continuance is addressed to the sound discretion of the court, and where there has been no abuse of such discretion, the refusal of the continuance is not available error. *p. 315.*

INTOXICATING LIQUORS.—*Sale to an Intoxicated Person.*—*Action on Bond.*—*Statutes Construed.*—Where a liquor dealer has violated section 15 of the act of March 17, 1875, by selling liquor to an intoxicated person, the injured party has a cause of action on the liquor dealer's bond, as provided by section 20 of the same act, and it is not necessary first to exhaust the principal, but the liability may be enforced in the first instance against the principal and sureties. *pp. 316, 317.*

SAME.—*Action on Bond.*—*Defective Complaint.*—*Bond as Evidence.*—In an action on the bond of a retail liquor dealer where the original complaint was technically defective, but by leave of court was amended after the close of the plaintiff's evidence, the admission of the bond in evidence was not erroneous. *p. 318.*

From the White Circuit Court. *Affirmed.*

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Guthrie & Bushnell and John R. Ward, for appellants.

A. W. Reynolds, A. K. Sills and Will R. Wood, for appellee.

BLACK, J.—This was an action against Charles Brandt, as principal, and Lorenzo D. Taylor and Isaac G. Burns, as sureties, upon the bond of said Brandt as a licensed retailer of intoxicating liquors, for injury sustained by Mattie Boyer to her means of support on account of the use of intoxicating liquors sold to her husband, Joseph Boyer, as alleged in one paragraph of the complaint (which contained two paragraphs), and on account of intoxicating liquors sold to one George Jessup, as alleged in the other paragraph of the complaint, said intoxicating liquors having been so sold by said Brandt in violation of the act of March 17, 1875, regulating the sale of intoxicating liquors, the action being based on section 20 of said act, section 7288, Burns' R. S. 1894 (5323, Horner's R. S. 1896), and the provision of said act alleged to have been violated being that of section 15, making it a misdemeanor to sell, barter or give away any spirituous, vinous or malt liquors to any person at the time in a state of intoxication.

The defendants united in an answer of general denial.

After the case had been twice continued to the next term, the parties, by their attorneys, appeared, and the cause was tried by jury, the verdict and judgment being for the appellee in the sum of eight hundred and thirty-two and one-third dollars.

In the complaint, as originally filed, and as it remained until the close of the evidence in chief for the plaintiff, said Mattie Boyer was named as the plain-

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tiff. After the evidence in chief for the plaintiff had been introduced, the plaintiff, by leave of court, and over the objection of the defendants separately, amended the complaint by inserting the words "State of Indiana, on the relation of," immediately before the name of Mattie Boyer in the title and also in the first line of the complaint, these being the only changes in the complaint.

It is claimed on behalf of the appellants that the court erred in permitting such amendment of the complaint.

The action on the bond should have been brought in the name of the State, on the relation of the injured person, and therefore it was subject to technical objection as originally filed; but the amendment did not affect the issue on trial. The nature of the cause of action was not changed. As is said in *Meyer v. State, ex rel.*, 125 Ind. 335, where this question is decided contrary to the view taken of it by the appellants in the present case, "The amendment was in furtherance of justice, and was within the letter as well as the spirit of the statute," citing section 396, R. S. 1881, being section 399, Burns' R. S. 1894 (396, Horner's R. S. 1896). See also, *Wabash, etc., R. W. Co. v. Morgan*, 132 Ind. 430, 437; *Sandford Tool & Fork Co. v. Mullen*, 1 Ind. App. 204; *Burns v. Fox*, 113 Ind. 205.

After the complaint had been so amended, the appellants, Taylor and Burns, each separately filed his affidavit for a continuance. The court refused a continuance, and the trial proceeded.

A verdict having been returned for the plaintiff, the appellants jointly moved for a new trial, the refusal of the court to grant the defendants a continuance being assigned as one of the grounds of the motion, which was overruled.

It does not appear that the appellant Brandt asked

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for delay, but it appears that the other two appellants separately did so, and that upon the overruling of their separate motions for a continuance, they excepted to this ruling.

The ground stated in the motion for a new trial, "refusing to grant defendants a continuance," did not, in fact, exist.

There was no ruling in relation to a continuance asked by the appellant Brandt, or to which he excepted. The overruling of the motions for a continuance, made by the other appellants, to which they had excepted, could not be a sufficient ground of a motion on behalf of the appellant Brandt for a new trial.

It is a familiar rule, that there is no error in overruling a joint motion which is not good as to all who join in it. *Robertson v Garshwiler*, 81 Ind. 463; *Boyd v. Anderson*, 102 Ind. 217; *Carnahan v. Chenoweth*, 1 Ind. App. 178.

If the manner in which it was sought to preserve the question as to a continuance should be ignored, still we could not regard the action of the court as available error.

It is provided by statute that no cause shall be delayed by reason of an amendment, excepting only the time to make up issues, but upon good cause shown by affidavit of the party or his agent asking such delay; and that the affidavit shall show distinctly in what respect the party asking the delay has been prejudiced in his preparation for trial by the amendment. Sections 397, 398, Burns' R. S. 1894 (394, 395, Horner's R. S. 1896).

Each of the sureties, in his affidavit for a continuance, while not alleging that he had not been served with summons, or that he had not knowledge prior to the trial of the pendency of the action, stated that it

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had been his understanding that the suit was against the defendant Brandt, individually, and could in no way affect the sureties; and there were other allegations tending to show that the affiants had been proceeding upon such theory.

As before remarked, the cause of action was not varied in any respect, and the issue on trial was not changed by the amendment. It did not render necessary or admissible any different evidence on behalf of either party. If, therefore, the sureties acted, or neglected to act upon the assumption that it was not a suit on the bond against them as well as against their principal, they did so at their own risk.

Each of the sureties in his affidavit stated that he could not make an active defense at that term, but did not show by statement of facts that he could make a better defense if granted a delay.

The affidavits did not show distinctly in what respect the parties asking the delay had been prejudiced in their preparation for trial by the amendment. See *Hubler v. Pullen*, 9 Ind. 273; *Cox v. Stout*, 85 Ind. 422.

An application for a continuance is addressed to the sound discretion of the court, and where, as here, there does not appear to have been an abuse of such discretion whereby injustice was done, the refusal of the continuance is not available error. *Whitehall v. Lane*, 61 Ind. 93; *Belck v. Belck*, 97 Ind. 73; *Warner v. State*, 114 Ind. 137.

A motion made by all the applicants jointly in arrest of judgment was overruled. This ruling is assigned as error; and it is also assigned that the complaint did not state facts sufficient to constitute a cause of action as against any of the appellants.

These assignments may be disposed of by remarking that they are waived by the express admission of

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the appellants in their brief that the complaint alleged sufficient facts to constitute a cause of action in favor of the plaintiff as against the appellant Brandt.

A cause assigned in the motion of appellants for a new trial, and urged in argument, was the admission in evidence of the bond in suit.

This matter may be considered in connection with the assignment of error, on behalf of the appellants Taylor and Burns, that the complaint did not state facts sufficient to constitute a cause of action against them.

It is contended that the complaint, as it was before the amendment, stated only a cause of action in tort against the appellant Brandt alone, for the reason that the action was brought by Mattie Boyer, and not by the State on the relation of Mattie Boyer, and, furthermore, it is contended that even after the amendment the complaint did not show a cause of action upon the bond, for the alleged reason that it contained no averment of the breach of the bond, this position of counsel being based, as we understand them, upon their assumption that "before there can be any liability on the bond, there must have been an action and a judgment against the saloonkeeper personally," and that if he fails to pay such judgment, suit may then be brought on the bond.

The bond in question, as required by section 4 of the act of March 17, 1875, section 7279, Burns' R. S. 1894 (5315, Horner's R. S. 1896), was conditioned that the appellant Brandt would keep an orderly and peaceable house, and pay all fines and costs that might be assessed against him for any violation of the provisions of said act of March 17, 1875, and for the payment of "all judgments for civil damages growing out of unlawful sales," etc.

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By section 20 of said act, mentioned before in this opinion, every person selling, etc., "shall be personally liable, and also liable on his bond filed in the auditor's office, as required by section 4 of this act, to any person who shall sustain any injury or damage to his person or property or means of support on account of the use of such intoxicating liquors, so sold as aforesaid, to be enforced by appropriate action in any court of competent jurisdiction."

The appellants contend that the two remedies thus given "are not concurrent, so that the plaintiff can elect which he will pursue, but that they are successive."

The provisions of the statute enacted together should be construed together. The intention of the legislature, which we must carry out, appears to be that the liability of the principal and sureties upon the bond, given under the provisions of section 4 of the act, shall extend to any injury or damage which any person shall sustain to his person, property or means of support, on account of the use of intoxicating liquors sold in violation of any of the provisions of the act of March 17, 1875, and that such liability may be enforced in the first instance against the principal and sureties by a suit against them upon the bond, without the circuitry of action suggested by counsel, so unnecessary that the intention to require it should not be attributed to the legislature, if the language of the statute admit, as it plainly does, a contrary construction.

The bond is statutory, and it was within the authority of the legislature to prescribe its form in said section 4, and to attach to a bond in that form such liability of the parties thereto as was provided for in said section 20.

The statute has had such practical application by

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the Supreme Court and by this court. *State, ex rel., v. Cooper*, 114 Ind. 12; *Wall v. State, ex rel.*, 10 Ind. App. 530; *Boss v. State, ex rel.*, 11 Ind. App. 257; *Reath v. State, ex rel.*, 16 Ind. App. 146.

The questioning of the sufficiency of the complaint by assignment of error has relation, of course, to the complaint as amended, and not to the complaint in its original form.

Inasmuch as we regard the original complaint as being a complaint on the bond, technically defective, but amendable, we cannot regard the admission of the bond in evidence as erroneous.

The judgment is affirmed, with 10 per cent. damages and costs.

FITZMAURICE v. PUTERBAUGH.

[No. 1,824. Filed Nov. 24, 1896. Rehearing denied March 31, 1897.]

APPEAL AND ERROR.—*Misjoinder of Causes.*—A cause will not be reversed for any error committed in sustaining or overruling a demurrer for misjoinder of causes of action. *p. 319.*

SALE.—*Implied Warranty.*—One who sells a chattel with knowledge that it is to be used for a particular purpose, impliedly warrants the same to be reasonably fit for that purpose. *p. 320.*

FRAUD.—*Sale.—Damages.*—Where the vendor of a second-hand steam boiler falsely and knowingly represents to the purchasers thereof that the boiler had been used just enough to be thoroughly tested and was as good as new, when in fact it was old and worthless, and unsafe for any purpose, and such representations were relied upon by the purchasers, the vendor must answer for any damages sustained by the purchasers resulting from the inherent defects in the boiler. *pp. 320, 321.*

TRIAL.—*Conflict Between General Verdict and Answers to Interrogatories.*—Where there is an apparent conflict between the general verdict and the answers to interrogatories returned therewith, the general verdict must control unless the answers are such as that both cannot be true under any supposable condition of the evidence within the issues. *pp. 321, 322.*

SAME.—*Interrogatories to Jury.—Contradictory Answers.*—If an-

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swers to interrogatories are contradictory then they nullify each other, and those which might alone control the general verdict cannot overthrow it. *p. 322.*

APPEAL AND ERROR.—*Bill of Exceptions.*—The record must show that the longhand manuscript of the evidence was filed in the clerk's office before it was incorporated in the bill of exceptions. *p. 322.*

SAME.—*Instructions, When not in Record.*—Instructions are not properly in the record where there is nothing in the record to show that they were filed, and that they were signed by the judge, and where there is no order making them a part of the record. *pp. 322. 323.*

From the Jay Circuit Court. *Affirmed.*

Thompson & Canaday, for appellant.

S. R. Bell and *J. B. Ross*, for appellee.

GAVIN, J.—Appellee sued to recover damages resulting from the explosion of a steam boiler sold to him and his brother by appellant, the inherent defects in the boiler having been the cause of the explosion.

The first paragraph of the complaint proceeds upon the theory of a warranty, while the second counts upon fraudulent representations. Appellant filed a motion to separate, and a demurrer for misjoinder of causes of action. Both were overruled. The statute, section 344, Burns' R. S. 1894 (341, Horner's R. S. 1896), expressly forbids a reversal for any error committed in sustaining or overruling a demurrer for misjoinder of causes of action. The courts give effect to the statute. *File v. Springel*, 132 Ind. 312; *Crum v. Yundt*, 12 Ind. App. 308.

In the first paragraph it appears that appellee and his brother were engaged in operating a saw mill and tile factory which were run by a steam boiler which was too small, and insufficient for the purpose; that they knew nothing of the kind or quality of materials used in constructing such boilers, but consulted with appellant who was a manufacturer of steam boilers,

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told him the size and capacity of their old boiler and that they desired a new one, and informed him of the purpose for which they desired it; that he told them he had just what they wanted, a second-hand iron boiler which had been tried and tested, and was better than a new steel boiler, and for which he would charge them \$375.00, the full price of a new one; that relying upon his statements, they purchased it, set it up and operated it; that appellee afterwards purchased his brother's interest in said mill; that the boiler was old, patched and worn out, entirely worthless and unfit for the purpose for which it was bought and, without any fault upon the part of appellee or anyone in charge of the same, but solely by reason of the inherent weakness of the material therein, it exploded, causing great damage to the mill, etc.

It is objected that there is here no direct averment of warranty and that the statements made by appellant were mere matters of opinion, dealers' chaff, upon which appellee had no right to rely, and which could not constitute a warranty.

If we assume, without deciding, this to be true, still the facts set forth abundantly establish an implied warranty that the boiler was reasonably fit for the purpose intended, and a breach thereof. *Zimmerman v. Druecker*, 15 Ind. App. 512; *Merchants, etc., Bank v. Frazee*, 9 Ind. App. 161; *McClamrock v. Flint*, 101 Ind. 278.

The second paragraph sets up substantially the same state of facts as the first, but goes still further averring more particularly the purchasers' ignorance of steam boilers and their inability to distinguish between good and bad material therefor; appellant's knowledge and skill therein, that he personally inspected their plant, told them he knew just what they wanted, that he had a steam boiler which was better

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than a new one, one constructed of iron plate, which had been used "just enough to be thoroughly tested," and was better and tougher than a new one, the plates of which were not so strong and durable as those constructed of iron; that he had no new boiler of the proper size and capacity and it would require a long time to make it, but that his second-hand boiler was nearly new, none the worse for use and in just as good shape as it ever was; that these representations were falsely, knowingly and fraudulently made, and were relied on by the purchasers, who, believing them to be true, bought the boiler, which was in fact an old one remodeled, was old, patched and worn out, many of the flues in it having been tipped and become worthless; that the sheets of metal in said boiler had been burned and rusted until entirely worthless and unsafe for any purpose.

There is here much more than mere matters of opinion, "dealers' talk," even by the most liberal interpretation of the terms. There are representations of existing facts, falsely and fraudulently made and believed, and relied upon by the purchasers. Under such circumstances the vendor must answer for the damages. *Bloomer v. Gray*, 10 Ind. App. 326; *Armstrong v. White*, 9 Ind. App. 588.

The jury returned a general verdict in appellee's favor with answers to numerous interrogatories. By some of these, it is expressly found that appellee did not, before the explosion, know that the boiler was unsafe. By others, appellant's counsel claim it is established that he did have notice of such unsafe condition. Because of these latter answers it is urged that appellee was guilty of contributory negligence in using the boiler with such notice. It is well settled that the general verdict must stand unless the an-

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swers are such as that both cannot be true under any supposable condition of the evidence within the issues. It is also settled that if the answers to interrogatories contradict one another then they nullify each other and those which might alone control the general verdict cannot overthrow it. *Heltonville Mfg. Co. v. Fields*, 138 Ind. 58; *Gates v. Scott*, 123 Ind. 459.

Numerous questions are argued relating to the sufficiency of, and rulings upon the evidence. Appellee, however, contends that under the law established by recent decisions of the Supreme Court the evidence is not properly in the record. This position must be sustained. Under this rule it must appear from the record that the stenographer's manuscript copy of the evidence was filed in the clerk's office before it was incorporated in the bill of exceptions or it cannot be received by us when transposed by the clerk into the transcript under section 1476, Burns' R. S. 1894 (1410, Horner's R. S. 1896); *Chicago, etc., R. R. Co. v. Wagner ante*, 22, and cases there cited.

The bill of exceptions in this case was presented to the judge and signed on January 18, 1895. The file marks show that the evidence and bill were filed on that day. The certificate of the clerk is that "on the 18th day of January, A. D. 1895, the official shorthand reporter who took down the evidence in said cause, filed in my office his longhand transcript and manuscript thereof, and the defendant at the same time filed his bill of exceptions, which longhand manuscript was made a part thereof; which is the same manuscript of the evidence incorporated in the bill of exceptions, and made a part of the foregoing transcript." This showing as to the priority of the filing of the evidence is identical with that appearing in *Thrash v. Starbuck*, 145 Ind. 673, and it was there adjudged to be insufficient, the court saying: "It is

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manifest that the longhand manuscript of the evidence was not filed in the clerk's office before the bill of exceptions was filed, or before it was incorporated in the bill."

This decision leaves us no room to distinguish or hold otherwise than that the evidence is not properly in the record.

It is further asserted by appellee's counsel that no question whatever is available upon the instructions for the additional reason that they are not in the record. In this contention also counsel are right.

Immediately after the order-book entry showing that the jury was charged and retired to the jury room comes the following: "Charge to the jury."

Then there is copied into the transcript a series of charges, including those asked by both parties. There is nothing, however, to show that these instructions were filed nor are they signed by the judge, nor is there any order making them a part of the record.

They are not, therefore, properly in the record by the statutory mode, without a bill. *Grand Rapids, etc., R. R. Co. v. Cox*, 8 Ind. App. 29; *Killion v. Hulen*, 8 Ind. App. 494; *Stephenson v. Elliott*, 11 Ind. App. 694.

There is an effort to bring some of the instructions in by a bill which does not purport to set out all the charges given, but on the contrary affirmatively discloses that it does not so do.

In the absence of the evidence and of all the instructions given it is impossible for this court to know whether there was any available error in giving those which are before us, or in refusing those rejected. The absent instructions may have cured any apparent error in those given, and covered all points to which those refused were applicable. *Grand Rapids, etc., R. R. Co. v. Cox*, *supra*; *Hawley v. Zigerly*, 135 Ind. 248.

Judgment affirmed.

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BECKER v. THE BALTIMORE AND OHIO SOUTHWESTERN
RAILWAY COMPANY.

[No. 2,100. Filed April 1, 1897.]

MUNICIPAL CORPORATIONS.—Public Improvements.—Assessments.—
Assessments for street and other improvements are upheld upon the theory that each lot or tract of land is benefited in a special and peculiar manner in a sum equal to the amount estimated or assessed against it. *p. 328.*

SAME.—Street Improvements.—Joint Assessment Voidable.—Statute Construed.—Under section 4293, Burns' R. S. 1894, an assessment for a street improvement which is made jointly against two or more separate and distinct tracts of land is voidable. *p. 328.*

SAME.—Street Improvements.—Assessment.—Sufficiency of Description.—An assessment for street improvements which describes the real estate sought to be assessed as a "tract of land, north side, between Front street and O. and M. R. R.," is invalid because of the uncertainty and insufficiency of the description. *p. 330.*

SAME.—Street Improvements.—Invalid Assessment May be Amended.—An erroneous or invalid assessment for street improvements may, upon proper application to the common council or board of trustees, be amended. *pp. 332, 333.*

From the Jackson Circuit Court. *Affirmed.*

W. K. Marshall, D. A. Kochenour and Burrell & Branaman, for appellant.

McMullen & McMullen, E. W. Strong and O. H. Montgomery, for appellee.

WILEY, J.—This was a proceeding by appellant against the appellee to foreclose and enforce a lien for street improvements.

Upon petition of the requisite number of property owners, the board of trustees of the town of Brownstown, in Jackson county, ordered the improvement of a certain part of Broadway street within the corporate limits of said town. Such proceedings were had as

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that the contract for said improvement was let, the work completed, and assessments made against all the property fronting or abutting on the part of the street so improved; and said assessments confirmed by the board of trustees.

The proceedings for said improvement were had under the act of 1889 and the amendments thereto, commonly known as the "Barrett Law." The person to whom the contract was let for said improvement, after partly performing the work, abandoned it, and his sureties completed it to the satisfaction and acceptance of the board of trustees. Bonds were issued to the sureties and the bonds upon which this action is based were assigned to appellant.

The assessment against the property of appellee as made and confirmed by the board of trustees, is as follows:

"Names of Owners—O. & M. R. W. Co.

No. of Lot—Tract of land north side between Front street and O. & M. R. R.

No. of feet front—130.

Rate per foot—1.92.

No. of Lot—Tract of land south of Broadway, between Front street and O. & M. R. R.

No. of feet front—130.

Rate per foot— 1.92.

Amount—\$499.20."

In this connection it is proper to say that the complaint avers that after these assessments were made and confirmed, the Ohio & Mississippi Railway Company was consolidated with the Baltimore & Ohio Railway Company under the corporate name of The Baltimore & Ohio Southwestern Railway Company, and that said consolidated railway company succeeded to all the rights, property, etc., of the Ohio & Mississippi Railway Company.

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The amended complaint is in three paragraphs and as they are each very lengthy it will subserve no good purpose to set them out in this opinion.

Each paragraph of the complaint avers in detail that the board of trustees in ordering said improvement complied with all of the provisions of the statute relating thereto, and each successive step taken by the board is specially set forth.

While it is essential to plead all the acts done by the municipal officers to show their authority, it is not required that there should be incorporated in the complaint, by reference or otherwise, any written instrument except the estimate or assessment. *Van-Sickle v. Belknap*, 129 Ind. 558; *Dugger v. Hicks*, 11 Ind. App. 374.

In the case at bar, each paragraph of the complaint is accompanied by a copy of the assessment as an exhibit.

The trial court sustained a demurrer to each paragraph of the complaint, to which the appellant excepted; and he declining to plead over, judgment was rendered against him for costs.

The only question, therefore, raised by the assignment of error for our consideration is the action of the court below in sustaining the demurrer to each paragraph of the amended complaint. As the three several paragraphs of the amended complaint are substantially the same, they may all be considered together.

It is contended by counsel for appellee that the assessment made against the property is not valid and the lien cannot be enforced, for the reason, first, that the assessment described two tracts or parcels of land entirely separate and distinct, and the assessment is made in a gross sum jointly against both of them; and second, that the assessment is void because of the un-

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certainty and insufficiency of the description of the real estate sought to be assessed. These two questions will be considered in their order.

1. Is the lien of the assessment invalid or voidable because made upon both parcels or tracts of appellee's lands jointly, and not against each of them separately?

The determination of this question depends upon the statute providing how assessments shall be made and the construction placed upon it by the courts.

Section 4293, Burns' R. S. 1894, provides that "when any such improvement has been made and completed * * * the board of trustees of such town, shall cause a final estimate of the total cost thereof to be made by the city or town engineer, * * * or the board of trustees of such town shall require said city or town engineer to report to the * * * board of trustees of such town the following facts touching said improvement: *First.* The total cost of said improvement. *Second.* The average cost per running foot of the whole length of that part of the street or alley so improved. *Third.* The name of each property owner on that part of the street or alley so improved. *Fourth.* The number of front feet owned by the respective property owners on that part of the said street so improved. *Fifth.* The amount of such costs for improvement due upon each lot or parcel of ground bordering upon said street or alley, which amount shall be ascertained and fixed by multiplying the average cost price per running front foot by the number of running front feet of the several lots or parcels of ground respectively. *Sixth.* The full description, together with the owner's name, of each lot or parcel of ground bordering on said street so improved."

It will be observed, and it seems manifest from the

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fifth subdivision of the section above quoted, that the assessment for the cost of the improvement must be made upon each lot or parcel of ground separately. It is evident from this provision of the statute that it was the intention of the legislature that each lot or parcel of ground subject to assessment for a street improvement, should bear its separate and distinct burden of the assessment, as apportioned in the manner provided by the statute. In principle, this is the correct theory and is certainly the law.

Assessments for street, and other similar improvements are upheld upon the theory that each lot or tract of land assessed is benefited in a special and peculiar manner, in a sum equal to the amount estimated or assessed against it. *Watson's Statutory Liens*, section 1204; *City of New Albany v. Cook*, 29 Ind. 220; *Ross v. Stackhouse*, 114 Ind. 200; *Jackson v. Smith*, 120 Ind. 520; *Heick v. Voight*, 110 Ind. 279; *Lipes v. Hand*, 104 Ind. 503; *Chamberlain v. Cleveland*, 34 Ohio St. 551; *Stuart v. Palmer*, 74 N. Y. 183; *Hammett v. Philadelphia*, 65 Pa. St. 146.

While these cases do not hold that an assessment for a street improvement, made jointly against two or more distinct and separate lots or tracts of land is voidable or invalid, yet they establish, beyond question, the principle and rule of such assessments.

We are of the opinion that an assessment for a street improvement which is made jointly against two or more separate and distinct lots or tracts of land is, at least, voidable, and an assessment so made does not create any lien, and, therefore, cannot be enforced.

We are not without authority upon this proposition, for it is well grounded in principle and fully sustained by the authorities.

The case of *Balfe v. Johnson*, 40 Ind. 235, is directly in point. In that case the appellants were the con-

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tractors for the improvement of a street in the city of Lafayette, and upon completion of the work, they brought an action upon a precept properly issued to collect the assessment against appellee's property. The assessment was made upon seven different lots specifically described, and the preliminary and final estimates were made in one gross sum against all of the lots. The court, speaking by Downey, J., said: "We have come to the conclusion that the assessment should show the amount for which each lot or piece of land is liable; that the affidavit for the precept should conform to it, in this respect, and that this is necessary, although the different lots or pieces of land belong to the same owner. This, we think, may be gathered from sections seventy and seventy-one of the act. It is provided in the seventieth section that the estimate 'shall be a lien upon the ground upon which they are assessed,' etc. According to section seventy-one, the precept must set forth the description of the lot or land on which it, the assessment, is made."

There is good reason why an assessment for a street improvement should be made upon each lot or tract of land separately, and upon this point we quote further from *Balfe v. Johnson, supra*. Continuing, the court says: "It may be in the power of the owner to pay the assessment upon one or more of the lots or pieces of land, and not upon all. If the assessment is made in one gross amount against all the lots, he could not do this, as the lien would cover all the lots, and all could be sold to discharge it."

It will be observed that the provision of section 71 of the act under which the proceedings were had in the case of *Balfe v. Johnson, supra*, is very similar to the provision of subdivision five of section 4293, of the act of 1889, above quoted.

In substance, they both require that the amount of

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the cost of the improvement shall be determined and fixed upon each lot or parcel of ground bordering on the street so improved; and hence the case cited is directly in point here.

The doctrine announced in *Balfe v. Johnson, supra*, was referred to with approval in *Reeves v. Grottendick*, 131 Ind. 107.

It seems clear to us, therefore, that these cases and the principles underlying and upon which assessments of this character are upheld, are decisive of the question under consideration adversely to the appellant.

2. We will next consider, briefly, the second question raised, to-wit: that the assessment is invalid and erroneous because of the uncertainty and insufficiency of the description.

The description of the appellee's real estate, as it was set out in the assessment roll, already appears in this opinion.

The assessment should not be held void or invalid if it sufficiently identifies the land so that it might be found and located by a competent surveyor. We are unable, however, to see how it could be located or its correct description arrived at from the description given in the assessment, by any means known to the science of surveying.

"Tract of land, north side, between Front street and O. & M. R. R." does not describe any tract of land, nor does it furnish any data from which its true description might be ascertained. It does not fix any starting point; it gives no metes and bounds, and furnishes no means of identification.

The maxim, "*Certum est quod certum reddi potest*," is not applicable here, for the reason that there is no means of making certain that which is so uncertain and indefinite. The rule only applies where there is some means, either by computation, measurement or

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in such case as this the science of surveying, that what is uncertain may be made certain.

It has been held that the property assessed must be so described that a person acquainted with surveying could find and identify it. *Yeakle v. City of Lafayette*, 48 Ind. 116; *Peru, etc., R. R. Co. v. Hanna*, 68 Ind. 562.

It is evident, from the description of the property in the case at bar, that even an expert surveyor could not find and identify it.

The case of *Lake Erie, etc., R. W. Co. v. Walters*, 9 Ind. App. 684, is almost identical with the one under consideration. That was an action to recover upon an assessment against the right of way of the appellant for a street improvement. The averment in the complaint in the case just cited, respecting the property assessed, is as follows: "That among other lots, parcels of ground and property assessed for the improvement of said street and abutting thereon was the following described unplatted tract of land owned by the defendant, situate in said city, county, and state, to-wit: The right of way of defendant's railroad, and being a strip of ground 134 feet long, abutting on North Main street, between Broadway and North streets." The description of that part of the right of way upon which an attempt was made to fix and enforce a lien, and as it appears upon the assessment roll, and as confirmed by the board of trustees, is as follows:

"Name of Owner.	No. of Lot.	Ft. Front.	Description of Lands.	Assessments.
L. E. & W. R. R. Co.	134	Right of Way.	\$164.82"

The court, speaking by Reinhard, J., said: "In the present case, the failure to describe the property in the complaint that it could be located or surveyed,

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renders the complaint bad. Conceding that it is not necessary to give the width of the right of way, it is nevertheless essential to show, we think, at what point on the right of way the 134 foot strip assessed begins, and where it terminates. This is not indicated. Somewhere between Broadway and North streets, abutting on Main street, 134 feet in length of the appellant's right of way was assessed. This is the most that can be said of the description. * * * In short, no data are given whatever, by which the court may judicially determine where the 134 feet in length has its beginning and its termination. * * * * *

"* * It is, therefore, so defective that the complaint cannot be upheld on demurrer."

From the cases cited, and upon principle, we see no escape from the conclusion that the complaint in the case at bar is fatally defective, and that the court did not err in sustaining the demurrer to it.

We do not wish to be understood as holding that the assessment is absolutely void and the appellant without any remedy, for this would preclude an amendment, which the statute authorizes and the courts uphold.

When the final estimate is made, the council or board of trustees approve it and direct its payment, and this final estimate is called an assessment. *New Albany, etc., Coke Co. v. Crumbo*, 10 Ind. App. 360.

Watson on Statutory Liens, section 1224, says: "It may often happen that the final estimate or assessment is invalid or incorrect without any intentional wrong on the part of any one. If there could be no correction, there could be no recovery for the work."

It has been repeatedly held by both the Supreme and this court that the common council or board of trustees may correct a final estimate. *Balfe v. Johnson, supra*; *Ball v. Balfe*, 41 Ind. 221; *Sands v. Hat-*

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field, 7 Ind. App. 357; *McGill v. Bruner*, 65 Ind. 421; *Goring v. McTaggart*, 92 Ind. 200.

Even where property liable for assessment has been wholly omitted from the assessment roll, it is in the power of the common council or board of trustees, so to alter and amend the final estimate and report that it will include the omitted property. *Sands v. Hatfield*, *supra*.

The amended seventh section of the act under which the improvements in the case at bar were made, requires that the common council or board of trustees shall approve and confirm the engineer's report, and in case it is incorrect to cause it to be amended and to make the assessment according to the report.

In an appeal from the precept, it has been held that where the estimate has been corrected by the common council, plaintiff may have the record so amended as to show that fact, but when it has not been corrected, the proceedings must fail until the proper officers make the requisite correction. *Balfe v. Johnson*, *supra*.

While the question of amending the final estimate or assessment has not been raised by counsel for appellant, we deem it proper, in the furtherance of justice and fair dealing, to make these observations upon the law relating thereto, as declared by the numerous decisions cited.

We are not holding or deciding that, upon an affirmance of the judgment below, the assessment can be amended so as to create a valid assessment and lien against appellee's property that may be enforced in a subsequent proceeding, for that question is not before us for our decision. We simply mean to say, that the great weight of authorities in this State, is, that an erroneous or invalid assessment for street improvement, may, upon proper application to the common council or board of trustees, be amended and cor-

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rected. Whether or not the appellant in this case, by prosecuting his action to final and adverse judgment against him upon an invalid and erroneous assessment, has waived his right to have the assessment corrected, we do not decide.

We find no error, and the judgment is affirmed.

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[No. 2,407. Filed April 1, 1897.]

PROVOCATION.—Assault and Battery.—Where words reasonably calculated under the circumstances to provoke the party to whom they are addressed are used, the court or jury trying the cause will be justified, in the absence of evidence to the contrary, in inferring the intent from such fact. *p. 336.*

JUDGMENTS.—Presumptions in Favor Of.—Presumptions essential to support the judgment are indulged in favor of the court trying the cause. *p. 336.*

PROVOCATION.—Assault and Battery.—Present Ability.—Statute Construed.—The phrase “who has the present ability to do so” as used in section 2067, Burns’ R. S. 1894 (1883, R. S. 1881), is held to mean that the person to whom such phrase applies is free from physical impediment or restraint which might prevent him at the time from striking or attempting to strike, or to do other violence to the person giving the offense. *pp. 336, 337.*

SAME.—Assault and Battery.—Judgment.—Statute Construed.—A finding in a judgment that defendant is guilty of provocation as charged in the affidavit, the affidavit charging that “the defendant did * * * by words, signs and gestures, provoke and attempt to provoke G to commit an assault and battery on the prosecuting witness,” etc., is proper if the court found defendant guilty either of a provoke or an attempt to provoke an assault and battery, as the same punishment is, under section 2067, Burns’ R. S. 1894 (1883, R. S. 1881), affixed to either offense. *p. 337.*

From the Howard Circuit Court. *Affirmed.*

Joseph C. Herron and Frank N. Stratton, for appellant.

W. A. Ketcham, Attorney-General, Merrill Moores, B. F. Harness and W. R. Voorhis, for State.

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COMSTOCK, C. J.—This prosecution was instituted by the State against appellant before a justice of the peace, under section 2067, Burns' R. S. 1894 (1983, R. S. 1881). The trial before the justice resulted in a conviction. An appeal was taken to the circuit court, where appellant was again convicted.

The error assigned is in overruling appellant's motion for a new trial.

The section of the statute upon which the prosecution is based, is in the following language: "Whoever by words, signs or gestures, provokes or attempts to provoke another, who has the present ability to do so, to commit an assault or assault and battery upon him, is guilty of criminal provocation," etc., etc.

The affidavit charged that "the defendant did * * * by words, signs and gestures, provoke and attempt to provoke Joseph W. Gregg to commit an assault and battery on the said prosecuting witness, he, the said Gregg, having then and there the present ability to commit such assault and battery."

Two crimes are defined by the section of the statute, the provoking of an assault, or an assault and battery, and the attempt to provoke an assault, or an assault and battery. In the one, the provocation is followed by an assault and battery, or an assault, and in the other an unsuccessful attempt is made to provoke an assault, or an assault and battery. To constitute either offense, the party towards whom the words, signs or gestures are used or made, must, as claimed by appellant, have the present ability to commit the offense which it is intended to provoke.

The intent is an essential element of either of these offenses. It may be proved like any other material fact by positive or circumstantial evidence.

Appellant contends that there is no evidence showing the necessary intent on the part of the defendant.

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The question of intent was one to be determined by the court or jury trying the cause.

If words reasonably calculated under the circumstances to provoke the party to whom they are addressed are used, the court or jury trying the cause will be justified, in the absence of evidence to the contrary, in inferring the intent from such fact. Presumptions essential to support the judgment are indulged in favor of the court trying the cause.

The material facts shown by the evidence are, in brief, as follows: The prosecuting witness, acting as a merchant policeman, clothed with the power to make arrests for the breach of the peace, at the request of a citizen of the city of Kokomo, separated a man and the defendant who were quarreling upon a public street in said city. After having separated these parties, he ordered the defendant, who persisted in continuing to quarrel, to go to her home, threatening to arrest her if she did not do so. She at first refused, but very soon thereafter moved away from the place where she had been standing, and while so doing, and when some thirty feet from the prosecuting witness, twice called him by a vile and opprobrious name. He was irritated and provoked, but made no attempt to approach nor strike her. There was no obstacle in the way of his going to, or taking hold of her.

The defendant introduced no testimony.

From these facts, the court found that the defendant intended to commit the offense with which she was charged. Appellant contends that the evidence fails to show that the prosecuting witness had the present ability to commit an assault upon the defendant.

Whether "present ability" exists must depend upon the circumstances of each particular case. Yet we think a reasonable interpretation of the words of the

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statute "having the present ability" is that the person to whom they are applied is free from physical impediment or restraint which might prevent him at the time from striking or attempting to strike, or do other violence to the person giving him offense. At a distance of thirty feet, unobstructed, the prosecuting witness, free from physical restraint, had, in the opinion of the court the present ability to commit an assault and battery, or an assault, upon the defendant. The time in which he might have traversed the distance between himself and the defendant could have been estimated in seconds.

While there are two offenses defined in the statute, the commission of either, constitutes criminal provocation. The judgment in the case at bar is that the defendant is guilty of provocation as charged in the affidavit. This form of judgment would be proper if the court found from the evidence the defendant guilty either of a provoke or an attempt to provoke an assault and battery, the language of the statute being, "Whoever * * * provokes or attempts to provoke * * * is guilty of criminal provocation." The same punishment is affixed to either; so that by the form of the judgment the defendant is not harmed if the evidence proved her guilty of either of the offenses defined in the statute.

We have carefully considered the able briefs submitted by counsel in this case, and given due weight to the arguments therein presented, and find no error in the record.

Judgment affirmed.

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[No. 1,977. Filed Jan. 14, 1897. Rehearing denied April 1, 1897.]

PRINCIPAL AND AGENT.—*Deposit of Principal's Money by Agent.—Liability of Principal for Overdraft of Agent.*—Where a principal furnishes money to his agents to purchase wheat for him for cash, and the agents deposit the money as received, on their own account, together with other money, with a merchant, the merchant knowing of the original agency and knowing that the agents were acting for their principal, and such agents issue checks on such deposits in payment of wheat purchased by them for their principal and for other purposes, and finally withdraw the balance on deposit and pay same to their principal in settlement, the merchant with whom the deposits were made cannot recover from the principal a balance on a check issued by such agents against such deposit, for wheat purchased for the principal at a time when they had money on deposit, and which was presented by the payee thereof with the request that part payment only be made thereon, the balance of which such merchant was required to pay after the deposits had all been withdrawn, the principal having no knowledge of the unpaid check at the time the money was paid him.

From the Tippecanoe Circuit Court. *Reversed.*

Joseph P. Gray, Edwin P. Hammond, Charles B. Stuart and William V. Stuart, for appellant.

James V. Kent and John F. McHugh, for appellees.

ROBINSON, J.—On the 15th day of June, 1892, the appellant, then residing at Frankfort, Indiana, entered into a written agreement with the firm of Miller and Kendall by which the appellant agreed to furnish, in such sums and at such times as were necessary to carry out their agreement, all the money with which Miller and Kendall should buy grain for the appellant, at Colfax, Clinton county, Indiana. Miller and Kendall agreed to buy for the appellant exclusively all

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the grain possible with the exercise of reasonable diligence, and to pay such prices only as the appellant should designate to them; they further agreed to guarantee the weights and grade of all grain so purchased by them, to load all the grain so bought and ship the same in appellant's name to such points as the appellant should designate, and as fast as shipped to turn over all bills of lading to appellant; to send to appellant scale checks daily of all grain bought for him, to use all the money sent them in the purchase of grain for appellant, and to call upon him for money only when needful to comply with their agreement. The appellant was to pay Miller and Kendall for their services two cents a bushel for all grain so bought and handled by them.

The evidence in this case shows the following facts: Miller and Kendall bought wheat under this agreement from the date of its execution until some time in September following. During that time the appellees under the firm name of Geo. Davis & Bro. were engaged in the merchantile business in Colfax. There being no bank at Colfax, Miller and Kendall deposited the money they used for purchasing wheat with appellees, and issued checks on the appellees for wheat bought from farmers and others, blank checks for the purpose being furnished by the appellees. The appellees requested that Miller and Kendall deposit their money with them. The appellant knew that the money, or some of it at least, he was furnishing from time to time to Miller and Kendall was being deposited with the appellees. All the money deposited during said time by Miller and Kendall with the appellees was deposited in the name of Miller and Kendall, and all the checks drawn on the appellees were signed by Miller and Kendall in their own names. The first money deposited by them with the appellees was

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on June 18, 1892, and the last on September 3, 1892. They deposited with the appellees the money they received from the appellant and also from other sources. During the time between, and including these two dates Miller and Kendall deposited in their own names with the appellees the total sum of \$20,990.75, and during the same time the appellant furnished Miller and Kendall under the contract, \$16,105.00. This money was kept in a pocketbook by the appellees, separate and apart from their own money. All money received by them from Miller and Kendall from whatever source was put in the same pocketbook and was paid out only on checks signed by Miller and Kendall, without reference to whether it was used in payment for grain purchased for the appellant, or for other purposes. No book account was kept of the money deposited and drawn out. The appellees kept a memorandum of the amounts deposited, with dates, and the checks paid showed the amounts paid out; but they kept no separate account of money which Miller and Kendall had received from the appellant, nor did they know what part of the total amount came from the appellant.

On the — day of September, 1892, within a few days after the last deposit was made by Miller and Kendall with appellees, the appellant and Miller and Kendall had a settlement of their accounts. On that day Miller and Kendall were owing the appellant an amount in excess of \$402.00, and on that day Miller and the appellant went to appellees' store, and at the request of Miller, George Davis, of the firm of George Davis and Bro., paid to Miller all the money Miller and Kendall then had on deposit with the appellees, amounting to \$402.00, which sum Miller then paid to the appellant.

On the 7th day of August, 1892, Miller and Kendall

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purchased from Malinda Mitchell, wheat amounting to \$163.68 and issued to her a check or order for said sum on appellees and signed by Miller and Kendall. This check was presented to the appellees for payment during the month of August, and at the request of Mrs. Mitchell, appellees paid her thereon, \$63.68, and endorsed on the back thereof, "paid on this check \$63.68," and handed the check back to her, which she retained. At the time this payment was made, Miller and Kendall had more than enough money on deposit with the appellees to pay the whole amount named in the check or order, and the part payment was made entirely at the request of Mrs. Mitchell. At the time of the settlement between the appellant and Miller this check was still unpaid. The appellant did not know until after the settlement with Miller that the check was in existence.

After the settlement between the appellant and Miller at appellees' store, the appellant was notified of the outstanding check. Payment was demanded of him, which he refused. Afterwards, in January, 1893, Mrs. Mitchell recovered a judgment in the Clinton Circuit Court against the appellees for the balance due on the check, which judgment the appellees paid on February 23, 1893. This action is brought by the appellees to recover from the appellant the amount paid by them to Mrs. Mitchell.

The complaint is in three paragraphs. A demurrer was sustained to the second paragraph and overruled as to the first and third, and exceptions saved. The appellant then answered by general denial. The cause was tried by the court, and a finding made in favor of the appellees for one hundred dollars. Appellant filed a motion for a new trial, on the grounds that the finding was not sustained by sufficient evidence, that it was contrary to law, that the damages

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assessed were excessive, and for errors of law occurring at the trial on the admission and rejection of certain testimony which is particularly set out in the motion. The motion was overruled and exception taken. Judgment rendered on the finding.

The only errors assigned in this court and discussed by counsel in their brief call in question the overruling of the demurrer to the first and third paragraphs of the complaint respectively, and the overruling of the motion for a new trial.

No error was committed in overruling the demurrer to the first and third paragraphs of the complaint. The first paragraph is the common count for money had and received and contains all necessary averments.

The third paragraph of the complaint also states a cause of action. We do not think it necessary to set out this paragraph at length. The objections urged by appellant's counsel are met by the allegation that the appellant, through his agent, deposited money with the appellees, under the agreement that as purchases of grain were made the agents would draw checks or orders on the appellees for the purchase price thereof, and upon presentation of such checks to them the appellees would pay the same out of the money deposited with them by the appellant.

The only remaining error discussed by the appellant's counsel is the overruling of the motion for a new trial.

There is some conflict in the evidence as to the time when, after the payment of the money to the appellant upon the settlement with Miller, the appellant was notified of the outstanding check. But it is not denied that he knew nothing of it until after the settlement had been completed and the money paid to him by

Miller, and the *bona fides* of the transaction is to be determined as of that time.

Neither is it clear from the evidence whether the wheat purchased from Mrs. Mitchell and for which the check was issued was received by the appellant. But we do not think that question is material to a correct decision of this case so far as the equity of the case is concerned, for it cannot be said from the evidence that the appellant has both the wheat and the money.

Miller and Kendall were the agents of the appellant, and were empowered to do everything necessary to carry out the terms of the written agreement. By the terms of that agreement the agents had no power to purchase wheat on the appellant's credit. They had authority to purchase wheat for the appellant for cash only. For their own convenience the agents entered into an agreement with the appellees for depositing the money with them. The consideration for that agreement was between the appellees and Miller and Kendall. The appellees knew of the agency, yet they chose to act with them on their own account.

There was no agreement between the appellant and the appellees about how the money furnished Miller and Kendall should be deposited. Appellant may have known that the money he was furnishing them was being deposited with the appellees. But appellees paid out none of it except on checks signed by Miller and Kendall. The money having been deposited in the name of Miller and Kendall and mingled with their own money, the legal title to the money was in them. They could issue checks for it for any purpose they saw fit, and did issue checks on the deposit for purposes other than for the purchase of wheat for the appellant. The appellees were not owing the appellant any money when the \$402.00 was paid him. He did not receive as much money at that time as

Miller and Kendall were owing him. A balance was still owing the appellant after the above payment by Miller.

The rule of law governing this case is the same as it would have been had the outstanding check been issued for some purpose other than the purchase of wheat.

It by no means follows that the \$402.00 was the balance of the money which the appellant had furnished to Miller and Kendall, and deposited by them with appellees.

It cannot be said that appellant received this money as his money, but he received it from Miller as part payment of what Miller at that time owed him. When the money which appellant furnished to Miller and Kendall had been by them commingled with their own money, it lost its identity, and could not, therefore, stand on the same ground as chattels.

It was held in *Lime Rock Bank v. Plimpton*, 17 Pick. 159, 28 Am. Dec. 286, that where an agent had loaned the money of his principal to his private creditor, who appropriated it to the payment of the debt, the principal could not recover it, the creditor not knowing at the time of the loan that the money belonged to the principal.

And where an agent deposits his principal's money in his own name together with his own funds the agent will be liable for a loss by a subsequent failure of the bank. *Naltner v. Dolan*, 108 Ind. 500, 58 Am. Rep. 61; *Mechem on Agency*, section 529; *Story's Equity*, section 1270; *Story's Agency*, section 208; *Norris v. Hero*, 22 La. Ann. 605; *Cartmell v. Allard*, 7 Bush. 482; *Commonwealth v. McAllister*, 28 Pa. St. 480.

We can see no difference between the above rule and the case where an agent after mingling the money

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with his own deposits the whole in his own name and then overdraws the amount by a check to an innocent third party.

In the case of *Stapp v. Spurlin*, 32 Ind. 442, the party who sold the wheat, the agent and the principal were the parties concerned. In that case the principal had put it in the power of his agent acting for him to wrong a third party and it was rightly held that the principal must respond. The principal trusted the agent to act for him, and as between the principal and the one who had dealt with him as his agent in good faith the principal must suffer the consequences of the bad faith of the agent with him.

But in the case at bar the rights of the parties are not to be determined from the original contract of agency. The arrangement entered into between the appellees and Miller and Kendall, as shown by the evidence, was not incident to the original contract of agency. The appellees knew the original agency and knew the agents were acting for the appellant. Knowing this fact they entered into an agreement with Miller and Kendall with which appellant had nothing whatever to do. He had no control over the deposit. It did not belong to him. A part of it was money derived from other sources. He could not issue checks or orders upon it. He was an entire stranger to the agreement. With a disclosed principal, the appellees chose to make an agreement with the agents alone, and if a mistake arose in carrying out the agreement, a person who is not a party to the agreement and who had nothing whatever to do with the commission of the mistake, should not suffer by it.

If at the time of entering into a contract the agent discloses the name of his principal, and the contract is then made with the agent alone, the person making

such contract with the agent cannot maintain an action upon it against the principal. *Silver v. Jordon*, 136 Mass. 319.

If the money is paid under a mistake of a material fact it may be recovered back. In this case a mistake was made when the appellees paid to Miller and Kendall more money than they then actually had on deposit. But there was no mistake in the payment of the money by Miller to the appellant.

As between the appellees and the agents the appellant is innocent of wrong or laches. If there was a wrong it consisted in drawing from the appellees, money, against a part of which there was an outstanding check. As between the appellees and the appellant the rule should be applied that whenever one of two innocent persons must suffer by the acts of a third, he who has put it in the power of such third person to occasion the loss must sustain it. *Preston v. Witherspoon*, 109 Ind. 457, 58 Am. Rep. 417; *Hunter v. Fitzmaurice*, 102 Ind. 449; *Lickbarrow v. Mason*, 2 Term. Rep. 70; *New York, etc., R. R. Co. v. Schuyler*, 34 N. Y. 30.

After a careful consideration of all the facts and circumstances in this case we are of the opinion that the rights of the parties to this suit must be determined without reference to the original contract of agency. The record fails to show that Miller and Kendall did business with the appellees as the agents of the appellant; but on the contrary, that the appellees, knowing that they were appellant's agents, chose to do business with them as principals and not as agents. The motion for a new trial should have been sustained.

Judgment reversed.

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HAFFIELD v. PAIN ET AL.

[No. 2,085. Filed April 2, 1897.]

APPEAL AND ERROR.—*Special Verdict.*—*When General Assessment of Damages Controls.*—*Insurance.*—Where the jury in an action on a fire insurance policy returned a special verdict in which a description of the property destroyed was set out, together with the value of a portion of it, and also returned therewith a general assessment of damages, a judgment for the amount of the general assessment of damages will be affirmed on appeal by plaintiff where the special verdict is insufficient to authorize a judgment for as large an amount as the general assessment.

From the Marion Superior Court. *Affirmed.*

W. V. Rooker and *W. D. Bynum*, for appellant.

R. O. Hawkins and *H. E. Smith*, for appellees.

ROBINSON, J.—The only question presented by this appeal is whether a general assessment of damages, or special answers to interrogatories shall control. The action was brought by appellant to recover damages for loss of property by fire. The jury returned a special verdict in which the property destroyed was set out, together with the value of a portion of it; and with the verdict the jury also returned what appellant's counsel term a general assessment of the damages sustained by appellant. In this general assessment the jury placed appellant's damages at \$394.30.

The special verdict law of 1895 requires that the verdict shall be in the form of interrogatories, so framed that the jury will be required to find one single fact in answer to each interrogatory. There is nothing in the act which prevents the jury from making a general assessment of the damages, but in such case the general assessment must correspond with the

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special answers, and if it does not, the special answers will control. We do not understand that what is termed a general assessment in this case, is a general verdict.

The authorities cited by appellant's counsel are all to the effect that if a special verdict is returned and with it the jury returns a general verdict, the special verdict will control. The doctrine declared by these cases is well settled; but in the case at bar there was no general verdict, but simply what is termed a general assessment of appellant's damages in a gross sum after the jury had set out specifically some of the particular items of damage.

At the proper time, appellant filed his motion for judgment in his favor on the special verdict for five hundred and twelve dollars. The record shows that this motion was sustained "but with this qualification: that the court sustains said motion only as to the amount of three hundred and ninety-four dollars, and not as to five hundred and twelve dollars; the said ruling of the court being for the reason that the general assessment of damages made by the jury in their special verdict herein controls the special verdict as to the worth and value of the several articles of property of said Haffield, destroyed." To this ruling an exception was properly saved.

The verdict sets out different items of personal property belonging to appellant, which were destroyed, and the value of these several items.

The property destroyed consisted of a barn upon which appellant held a lease, and which he was occupying at the time it was destroyed; and also certain other property consisting of hay and certain farming implements, which were in the barn at the time of the fire.

The verdict states that appellant was the lessee of

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the barn destroyed, and that his lease would expire March 1, 1897; that the annual value of the lease to the appellant on September 21, 1894, prior to the fire, was one hundred dollars, and that the fair cash rental value of the barn was eight dollars and thirty-three and one-third cents per month. As is said by appellees in their brief, the above is all the finding of the jury upon the subject of the lease held upon the barn and its value.

Appellant's counsel contend that appellant's damage by reason of the destruction of the barn alone was \$244.21, which would be the rent at eight and one-third dollars per month for the time the lease had to run after the fire and until its expiration. In making up the amount for which judgment was rendered, the jury necessarily allowed appellant something for the destruction of his leasehold, but it is evident the amount appellant claims should be allowed was not allowed. It is evident, also, that the measure of damages for the destruction of the leasehold estate would not be the amount claimed by appellant. It is not possible to determine from the verdict what damage appellant did suffer by reason of the destruction of the leasehold. It does appear that when the verdict was read, appellant asked that the jury be required to return again and reassess the damages so that the general assessment would correspond with the special answers, but we find no motion in the record whereby appellant sought to have that part of the verdict in reference to the leasehold estate made definite and certain.

As we view the special verdict, had the trial court disregarded this general assessment of damages it would necessarily have given judgment in an amount less than was given.

Whether there was any evidence showing the pres-

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ent worth of the leasehold estate we cannot say, but it is evident that the present worth cannot be determined from the special answers alone.

We do not decide whether what is termed the general assessment of damages is, or is not properly a part of the special verdict, for whether it is, or is not a part of the verdict there is no error of which appellant can complain.

Judgment affirmed.

BLACK, J., took no part in the decision of this case.

WALBERT v. THE STATE.

[No. 1,974. Filed April 6, 1897.]

APPEAL AND ERROR.—*Bill of Exceptions.*—The record must affirmatively show that the bill of exceptions was filed in the clerk's office of the court wherein the cause was tried after being signed by the judge.

SAME.—*Longhand Manuscript of Evidence.*—It must affirmatively appear from the record that the longhand manuscript of the evidence was filed in the clerk's office before it was incorporated in the bill of exceptions.

AFFIDAVIT.—*Sufficiency of in an Action Against a Saloonkeeper for Allowing a Minor to Loiter in a Saloon.*—An affidavit against a saloonkeeper under section 5 of the act of 1895 (Acts 1895, p. 248), for allowing a minor to loiter in a saloon is not bad by reason of its failure to charge that the offense was "unlawfully" committed.

From the Wells Circuit Court. *Affirmed.*

Rinehart & Walbert, for appellant.

W. A. Ketcham, Attorney-General, *Merrill Moores* and *Jay A. Hindman*, for State.

WILEY, J.—This was a prosecution commenced before the mayor of the city of Bluffton, under section 5323, Horner's R. S. 1896, being section 5 of the act

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of 1895 (Acts 1895, p. 248), commonly known as the "Nicholson Law," and is as follows: "Any person engaged in the sale of spirituous, vinous, malt liquors or any intoxicating liquors to be drunk as a beverage, who shall allow, suffer or permit any person under the age of twenty-one years to loiter in the saloon or place of business where said person is engaged in the sale of spirituous, vinous, malt or other intoxicating liquors, as aforesaid, shall upon conviction thereof be fined in any sum not less than \$10.00 nor more than \$100.00, to which imprisonment in the county jail may be added not exceeding ninety days."

The affidavit charging the offense was as follows: "John Crosbie swears that one Elmer Walbert is and was on the 6th day of July, 1895, a person engaged in the sale of spirituous, vinous, malt and other intoxicating liquors to be drunk as a beverage in Wells county, in the State of Indiana; that on said date said Walbert did then and there allow, suffer and permit one Jasper Feeser, a person under the age of twenty-one years, to loiter in the saloon where said Walbert is engaged in the sale of spirituous, vinous, malt and other intoxicating liquors as aforesaid."

There was a conviction before the mayor, an appeal to the circuit court, where appellant's motion to quash the affidavit was overruled, trial by jury, a finding of guilty, a fine of ten dollars assessed, and, over his motion for a new trial, judgment was pronounced on the verdict. To each of these adverse rulings appellant excepted, and on appeal to this court has assigned error as follows:

1. Overruling the motion to quash the affidavit.
2. Overruling the motion for a new trial.

The fourth, fifth, sixth, seventh, eighth, ninth and tenth reasons assigned for a new trial were alleged errors of the court in giving, giving as modified, and

in refusing to give certain instructions specified and mentioned therein.

The record contains what purports to be two bills of exceptions. Bill of exceptions number one contains certain instructions given, those modified and given, and those refused as tendered by appellant; but there is nothing in the record to show that these were all the instructions in the case. Bill of exceptions number two contains the longhand manuscript of the evidence as taken down and transcribed by the official reporter, and all of the rulings of the court in the admission and rejection of evidence, and the exceptions thereto. Both bills of exceptions are properly signed by the trial judge. The certificate of the clerk attached to the transcript is as follows: "I, Robert F. Cummins, clerk of the Wells Circuit Court, do hereby certify that the above and foregoing is a full, true and complete transcript of the proceedings, pleadings, papers, files, record entries and judgment in the above entitled cause as the same appear of record in my office. And I further certify that on the 19th day of October, 1895, the official reporter who took down the evidence in said cause, filed in my office his longhand manuscript thereof, which is the same manuscript of the evidence incorporated in the bill of exceptions made a part of the foregoing transcript."

The certificates of the trial judge show that he signed each bill of exceptions, October 19, 1895, the day the clerk certifies the longhand manuscript of the evidence was filed in his office. There is no file mark or certificate of the clerk to show or indicate that these bills of exceptions, after having been signed by the judge, were ever filed in the clerk's office.

Under the specific provision of the statute, and the repeated decisions of the Supreme and this court, the bills of exceptions are not properly in the record and

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hence no question arising on the instructions or evidence is presented to us for review.

Section 641, Burns' R. S. 1894 (629, Horner's R. S. 1896), provides that "The party objecting must, within such time as may be allowed, present to the judge a proper bill of exceptions, which, if true, he shall promptly sign and cause it to be filed in the cause."

The record shows that the bills of exceptions were, within the time allowed, presented to the judge and duly signed by him. The provision of the statute quoted must be construed as meaning that such bills of exceptions must be filed in the clerk's office of the court wherein the cause was tried, and the record must affirmatively show such filing.

The certificate of the trial judge that the bill was signed by him is not sufficient to make such bill a part of the record. *Dehority v. Whitcomb*, 13 Ind. App. 558.

Where there is nothing in the record to show that a bill of exceptions was ever filed in the clerk's office, the bill is not properly in the record. *Evansville, etc., R. W. Co. v. Meadows*, 13 Ind. App. 155; *Davee v. State, ex rel.*, 7 Ind. App. 71; *Gish v. Gish*, 7 Ind. App. 104; *Prather v. Prather*, 139 Ind. 570; *Rivers v. State*, 144 Ind. 16; *Armstrong v. Dunn*, 143 Ind. 433; *Smith v. State*, 143 Ind. 685.

There is a further objection to bill of exceptions number two, in that it does not affirmatively appear from the record that the original longhand manuscript of the evidence was filed in the clerk's office before it was incorporated in the bill, and this is essential. *Pittsburgh, etc., R. W. Co. v. Cope*, 16 Ind. App. 579; *Hamrick v. Loring* (Ind. Sup.), 45 N. E. 107; *Pruitt v. Farber*, 147 Ind. 1; *Kelso v. Kelso*, 16 Ind. App. 615; *Rogers v. Eich*, 146 Ind. 235.

To multiply authorities upon this proposition would be useless.

Under the authorities we have cited, the motion for a new trial and the evidence are not properly in the record, and, therefore, there is but one question presented for our consideration, and that is the sufficiency of the affidavit.

It is contended by appellant that his motion to quash the affidavit should have been sustained, for the reason that it does not charge that the offense was "unlawfully" committed.

We do not think this contention of appellant is tenable, and he has failed to cite any authority in support of it.

It is the settled law in this State that an affidavit or indictment in charging an offense is sufficient if it follows the language of the statute. *Franklin v. State*, 108 Ind. 47; *State v. Swope*, 20 Ind. 106; *State v. McClure*, 4 Blackf. 328; *State v. Murphy*, 21 Ind. 441; Gillett's Criminal Law, section 134.

In *State v. Murphy, supra*, which was a prosecution for assault and battery with felonious intent, the indictment was held good, though the word "unlawful" was omitted therefrom.

The statutory definition of an assault and battery is "Whoever in a rude, insolent or angry manner unlawfully touches another," etc.

It will be observed that the statute uses the word "unlawfully" in defining the offense. Yet, it was held that the affidavit was sufficient though it omitted the word "unlawfully," as it appeared from the affidavit as a whole that the acts charged were unjustifiable, or, in other words, unlawful.

In a prosecution for carrying a concealed weapon an information was held good where the offense charged was in the substantial language of the stat-

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ute and the word "unlawfully" was omitted therefrom. *State v. Swope, supra.*

In a prosecution for disinterring a corpse, an indictment was held good without the use of the word "unlawfully." It was said, Blackford, J., speaking for the court: "The defendant further contends, that the indictment should have alleged the disinterment to be unlawful; but the term 'unlawful' is not used in the statute, and there can be no reason for inserting it in the indictment." *State v. McClure, supra.*

Guided by these authorities, and the plain language of the statute defining the offense with which the appellant is charged, we unhesitatingly reach the conclusion that the affidavit was sufficient, and that the court did not err in overruling the motion to quash.

Judgment affirmed.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY v. NORMAN.

[No. 2,151. Filed April 6, 1897.]

APPEAL AND ERROR.—Assignment of Error.—Statute Construed.—

Under section 667, Burns' R. S. 1894, requiring that the assignment of errors shall be specific, each specification of error must be complete in itself and must in itself alone be sufficient to require the court on appeal to review some action of the court below.

SAME.—Assignment of Error.—As to Separate Paragraphs of Complaint.—An assignment of error which seeks to question in the Appellate Court for the first time the sufficiency of a separate paragraph of the complaint presents no question for consideration, as nothing less than an assignment that the complaint as an entirety does not state facts sufficient will raise, for the first time on appeal, any question concerning the sufficiency of any paragraph of complaint.

SAME.—Longhand Manuscript of Evidence.—The longhand manuscript of the evidence must be filed in the clerk's office before the filing of the bill of exceptions in which it is incorporated.

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TRIAL.—*Misconduct of Counsel.*—Overruling an objection to a statement by counsel in his argument to the jury, in an action against a railroad company for stock killed, in commenting on the testimony of a certain witness as follows: "He knows that this railroad company never pays for stock killed," is not reversible error where the court admonished counsel to confine his remarks to the evidence, and to keep within the record.

From the Boone Circuit Court. *Affirmed.*

L. L. Smith, S. M. Ralston and Michael Keefe, for appellant.

C. W. Griffin and William Griffin, for appellee.

BLACK, J.—The appellee's complaint against the appellant, to recover the value of cattle killed by being run against by the appellant's locomotive and cars, consisted of six paragraphs.

In the appellant's assignment of errors there are seven specifications. Each one of the first six specifications seeks to question in this court for the first time the sufficiency of a separate paragraph of the complaint. There is no assignment addressed to the question of the sufficiency of the entire complaint.

The statute, section 667, Burns' R. S. 1894 (655, Horner's R. S. 1896), requires that the assignment of errors shall be specific. Each supposed error must be specified. The specifications must be distinct, and each specification must be complete in itself, and must in itself alone be sufficient to require the court on appeal to review some action of the court below.

The assignment of errors is a pleading in the appellate court. It is analogous to a complaint in the trial court, and as each paragraph of a complaint must be complete in itself without aid from any or all other paragraphs, so each specification of error must be in itself sufficient. See Elliott's App. Proced., sections 308, 309, and cases there cited.

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The assignments relating to the separate paragraphs of appellee's complaint do not present any question for our consideration. *Higgins v. Kendall*, 73 Ind. 522; *Trammel v. Chipman*, 74 Ind. 474; *Carr v. State, ex rel.*, 81 Ind. 342.

Nothing less than an assignment that the complaint, as an entirety, does not state facts sufficient, will raise any question concerning the sufficiency of any paragraph of the complaint. *Schuff v. Ransom*, 79 Ind. 458; *Haymond v. Saucer*, 84 Ind. 3; *Lake v. Lake*, 99 Ind. 339; *Louisville, etc., R. W. Co. v. Ader*, 110 Ind. 376; *Ashton v. Shepherd*, 120 Ind. 69; *Board, etc., v. Tichenor*, 129 Ind. 562; *Thatcher v. Turney*, 7 Ind. App. 667; *DeVay v. Dunlap*, 7 Ind. App. 690.

If it be desired by the defendant to test, in this court, the sufficiency of a particular paragraph of a complaint containing more than one paragraph, the question must be saved by exception to the overruling of a demurrer to the particular paragraph, and by assigning that ruling as error.

The seventh assignment is, that the court erred in overruling the appellant's motion for a new trial.

The transcript contains what purports to be the original longhand copy of the reporter's shorthand notes of the evidence, but it does not appear that this copy was filed in the office of the clerk before the filing of the bill of exceptions in which it is incorporated.

Therefore, under many recent decisions of the Supreme Court and of this court, we cannot regard the evidence as properly before us. *Rogers v. Eich*, 146 Ind. 235; *Pittsburgh, etc., R. R. Co. v. Cope*, 16 Ind. App. 579; *Pruitt v. Farber*, 147 Ind. 1; *Kelso v. Kelso*, 16 Ind. App. 615; *Board, etc., v. Fertich*, 18 Ind. App. 1.

In the absence of the evidence, we cannot determine

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the question as to its sufficiency to sustain the verdict, or the question as to the amount of the damages assessed.

One of the causes stated in the motion for a new trial was, that the court erred in permitting a person named, "attorney for plaintiff, to make the following statement in his closing argument to the jury, to-wit: 'He,' witness King meaning, 'knows that this railway company never pays for stock it kills.' "

The next cause in the motion was, that the same person named, "attorney for plaintiff, was guilty of misconduct in saying to the jury in his closing argument, while commenting on the testimony of one King, who was a witness in said cause, that 'He knows that this railway company never pays for stock it kills.' "

A separate bill of exceptions states that the person mentioned in the motion for a new trial as attorney for the plaintiff, in his closing argument to the jury, while commenting upon the testimony of one King, a witness in the cause, made use of the following language: "He knows that this railway company never pays for stock it kills." To which remark counsel for the defendant objected, but the court overruled the objection and admonished counsel for plaintiff to confine his remarks to the evidence, and to keep within the record, "to which ruling of the court the defendant at the time excepted."

The knowledge which the attorney thus attributed to the witness could not properly have been in evidence. While it is stated in the bill of exceptions that the court overruled the objection made by appellant, it is also stated that the court admonished counsel for the appellee to confine his remarks to the evidence and to keep within the record.

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The bill does not show in what language the court overruled the objection, but it appears that in the presence of the jury, where the language to which objection was made had been spoken, the court in admonishing counsel showed the jury the irrelevancy of the remark of the attorney.

In *Morrison v. State*, 76 Ind. 335, it was said: "But not every transgression of counsel beyond the bounds of strictly proper discussion can be deemed a fatal and incurable error; and, whatever its character, it cannot be made available unless pointed out to the lower court, and the ground of objection specifically stated." See, also, *Coble v. Eltzroth*, 125 Ind. 429.

It does not appear upon what ground or in what terms the appellant objected to the remark of the attorney.

It is to be presumed, the contrary not appearing, that the offending attorney obeyed the admonition of the court, and that the jurors, being men of ordinary intelligence and honesty, understood that the remark to which objection was made and for which the attorney was so admonished ought not to influence their deliberations.

So far as the language of the court is shown, it was appropriate, and it was apparently effectual. If it does not appear that the court directly admonished the jury concerning the remark of counsel, it also does not appear that the court was called upon to do so. To support a criticism for failure to take any particular action, it should be shown that such action was invoked. *Worley v. Moore*, 97 Ind. 15; *Carter v. Carter*, 101 Ind. 450; *Choen v. State*, 85 Ind. 209; *Combs v. State*, 75 Ind. 215.

"There must be a plain case of violation of the privilege of argument, which has not been sufficiently counteracted by the trial court, and such misconduct

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as can be said by this court to have been injurious to the objecting party, to justify us in reversing the action of the trial court in overruling a motion for a new trial based upon such departure of counsel." *City of Lafayette v. Weaver*, 92 Ind. 477.

The appellate court can interfere in such cases only when substantial injury has been done. *Shular v. State*, 105 Ind. 289.

Under the facts shown by the record, we cannot conclude that the remark of counsel in question was substantially injurious to the appellant.

Judgment affirmed.

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[No. 2,096. Filed April 7, 1897.]

ACTION.—Nature Of, How Determined.—The question whether an action in which a judgment was recovered was an action in tort or in contract, must be determined by the pleadings in the cause in which the judgment was rendered. p. 363.

SAME.—Action on Guardian's Bond an Action in Contract.—Exemption.—An action on a guardian's bond, under section 2691, Burns' R. S. 1894, is an action in contract, within section 715, Burns' R. S. 1894, allowing a householder's exemption on execution or other final process for any debt growing out of, or founded upon a contract. pp. 363, 364.

EXEMPTIONS.—Statutes Liberally Construed.—Statutes providing for exemptions are liberally construed. p. 366.

SAME.—Residence of Execution Debtor.—Schedule Filed by Wife in Absence of Husband.—Statute Construed.—Where an execution debtor, to avoid criminal process, leaves the house where he has resided with his family, and his whereabouts are unknown, such debtor does not thereby lose his residence so as to deprive his wife from filing schedule and reserving for him a householder's exemption, as provided in section 715, Burns' R. S. 1894. pp. 364–367.

RESIDENCE.—Not Lost Till Another is Acquired.—A man can have but one place of residence; and to lose his residence in one place he must acquire a residence in another. p. 367.

From the Noble Circuit Court. *Affirmed in part, reversed in part.*

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H. C. Peterson and L. W. Welker, for appellant.

L. H. Wrigley and H. G. Zimmerman, for appellees.

BLACK, J.—This was an action of replevin, brought by the appellant against the appellees, Christopher C. Simon, William H. Kreager and John D. Kreager, who answered by general denial.

The cause was tried by the court and a special finding was rendered, with conclusions of law in favor of the appellees.

A motion for a new trial made by the appellant having been overruled, judgment was rendered in accordance with the conclusions of law.

The appellant's action was based upon her claim that the property in dispute was owned by her husband, Benjamin B. Green; that it had been levied on by the appellee Simon, as sheriff, under an execution issued on a judgment which had been rendered against said Benjamin and his sureties, upon his bonds as guardian of certain minors, at the suit of the appellee, William H. Kreager, as successor of said Benjamin as such guardian; and that after the levy and before sale thereunder, the appellant had demanded exemption, after having executed and delivered to said sheriff a schedule verified by her of the property of said Benjamin, in his absence from home, he being still absent, and being a resident householder, said scheduled property having been duly appraised.

It appeared from the evidence, and was shown in the finding, that said judgment was rendered in an action on the guardian's bonds, against him and his sureties, for an amount due the successor in said guardianship, as such, from said Benjamin and his sureties "on the several bonds sued upon," such recovery being for moneys of said wards which had come to the hands of said Benjamin as their guardian,

which he had concealed and converted to his own use, and had failed and refused to pay over to his said successor.

Included among the articles described in the complaint and in said schedule, which were levied on under the execution, were a certain buggy and a certain set of single harness, which the court found and adjudged to be the property of the other appellee, John D. Kreager. The evidence appears to have authorized the trial court to conclude that at the time of the issuing of the execution said Benjamin had not title to these articles, but that the ownership thereof was in said John D. Kreager, and we are not disposed to disturb the judgment so far as it is in favor of said John D. Kreager against the appellant in relation to said buggy and harness.

So far as the finding and judgment are in favor of the other appellees, the court seems to have proceeded upon two theories, one being that the judgment upon which the execution in question issued was in tort, and, therefore, no exemption was allowable to the execution defendant or to his wife acting in his behalf.

The basis of this theory seems to have been that because the recovery upon the bonds was for money concealed by the guardian and converted to his own use, for which defalcation the statute provides, that the damages recoverable in a suit on the guardian's bond shall include ten per centum of the amount otherwise assessed, therefore, the guardian was deprived of the right to claim any property as exempt from the execution issued on the judgment.

We are unable to agree with such a view of the matter.

The statute, section 715, Burns' R. S. 1894 (703, Horner's R. S. 1896), provides: "An amount of prop-

erty not exceeding in value \$600.00, owned by any resident householder, shall not be liable to sale on execution or any other final process from a court, for any debt growing out of or founded upon a contract, express or implied, after the taking effect of this act."

The nature of the cause of action, the question whether it was in tort or in contract, must be determined by the pleadings and issues in the cause in which the judgment was rendered. *Gentry v. Purcell*, 84 Ind. 83; *Smith v. Wood*, 83 Ind. 522; *Ries v. McClatchey*, 128 Ind. 125; *Furry v. O'Connor*, 1 Ind. App. 573; *DeHart v. Haun*, 126 Ind. 378; *Maloney v. Newton*, 85 Ind. 565.

The action in which the judgment was rendered was upon express contracts set out with the complaint as exhibits, the recovery being within the amount of the bonds.

The statutes, section 2691, Burns' R. S. 1894 (2527, Horner's R. S. 1896), provides: "Any bond given by any guardian may be put in suit by any person entitled to the estate, and such suit shall be governed by the law regulating suits on the bonds of executors and administrators."

The law regulating suits on bonds of executors and administrators provides, as to the measure of damages in such suits, that it shall be the value of the property converted, etc., the injury to the estate, or any person interested therein, interest on the money retained, such exemplary damages as the court or jury trying the cause may be willing to give, and ten per centum on the whole amount assessed; and that no stay of execution or benefit of valuation or appraisement laws shall be allowed on a judgment on such bond as to the property of the principal. Sections 2614, 2615, Burns' R. S. 1894 (2459, 2460, Horner's R. S. 1896).

Thus the legislature has provided for suit on the bond and has prescribed special characteristics of the judgment and execution thereon, some of which do not pertain to an ordinary action, whether for tort or on contract, but it has not provided that there shall be no exemption in such case, while it has elsewhere provided for the exemption from liability to sale on execution for any debt growing out of or founded upon a contract, express or implied.

In *Wireman v. Mueller* (Pa. Sup.), 7 Atl. 592, it was held by the Supreme Court of Pennsylvania, that the judgment defendant in an action of assumpsit, though the foundation of the action was embezzlement, was, under the statute of that state, entitled to exemption, the action being in contract, and not *ex delicto*.

In this connection we may refer to an exception saved by the appellant to the admission of the testimony of an attorney who had been engaged as such in the action on the bonds, the purpose of the evidence being to support the theory that it was an action in tort. Such evidence was improper. It was said in *Smith v. Wood, supra*, "Where the complaint, upon which a judgment has been rendered, is unequivocal in respect to the character of the cause of action, there cannot be an inquiry into the evidence adduced upon the trial for the purpose of admitting or excluding a claim for exemption." See, also, *Gentry v. Purcell, supra*; *Pickrell v. Jerauld*, 1 Ind. App. 10.

But the question to which the argument has been largely directed relates to the court's finding that at the time of the issuing of the execution and thereafter the appellant's husband was not a resident householder.

The evidence shows that for many years he had resided continuously in the county wherein the execution was issued, keeping house there with his wife and

five children; that on the 18th of July, 1895, the day before the issuing of the execution, he left his home and family, without having made any statement to them or any one else of his intention to leave, or of his destination; that he had not returned to his home; that his wife and family continued to live and keep house at the same home where he had left them; that his wife had not heard from him, except once, when she received from him a letter, dated July 30, 1895, and mailed at Los Angeles, California, in which he referred to certain notes and accounts inclosed in the letter, and gave explanations and directions concerning their collection. A letter afterward mailed to him at Los Angeles, California, had not been received by him, but had returned to the writer. His wife, at the time of the trial, did not know where he was, and had no knowledge as to where he had been since his departure, except that derived from the fact that said letter had come from him in California. It did not appear that any prosecution had been instituted against him, but he had embezzled the money in his possession as guardian, and the judgment had been rendered therefor upon his bonds as guardian. He had secretly absconded and had departed from the State, his whereabouts being unknown.

Upon such a state of facts the court found that he was not a resident householder when his wife claimed exemption in his behalf.

The statute under which she preferred her claim, section 727, Burns' R. S. 1894 (715, Horner's R. S. 1896), provides: "In any case when the execution defendant is absent from this State, or shall absent himself from home, and an attachment or execution shall be directed against his property, his wife may make out and verify the schedule of his property, and claim and receive for him the exemption provided in this act,

and claim and exercise all the rights which would belong to her husband were he present."

Under another statutory provision, above quoted, "any resident householder" could make the claim for himself were he present.

The statutes of the several states upon the matter of the exemption of the property of debtors differ greatly. The decisions in other jurisdictions can be of little aid, unless they relate to statutory provisions like our own.

Our statute is very broad and general in its terms.

The decisions of the courts here and elsewhere indicate that it is the understanding of the courts that such statutes must be applied and carried into effect in the liberal spirit which gives rise to such laws. They are intended, not for the benefit of the debtor himself alone, else their provisions would be extended to persons who are not householders; but the purpose of such enactments is to secure provision for the wants of indigent families. The State at large and the local governments thereof are greatly interested in the preservation of means for the maintenance and education of the poor, who but for such beneficent legislation would often be reduced to such conditions that not only would private suffering be increased, but also the public welfare would be impaired.

In support of the statement that such statutes are to be liberally construed very many cases might be cited in this and other states. We take space for but a few. See *Kelley v. McFadden*, 80 Ind. 536; *Astley v. Capron*, 89 Ind. 167; *State, ex rel., v. Read*, 94 Ind. 103; *Wilson v. Joseph*, 107 Ind. 490; *Chatten v. Snider*, 126 Ind. 387; *Pickrell v. Jerauld*, *supra*; *Coppage v. Gregg*, 1 Ind. App. 112; *Eisenhauer v. Dill*, 6 Ind. App. 188.

In *Norman v. Bellman*, 16 Ind. 156, where an execu-

tion debtor had left the house where he resided with his family to avoid criminal process, and though frequently seen in the county, his usual whereabouts were unknown, it was held that these facts did not deprive him of the right to exemption.

We may take into consideration, in this connection, the presumption that the residence of a person shown to have been in a particular place continues in that place until the contrary is shown.

The general rule is, that a man can have but one place of residence, and that, to lose his residence in one place, he must acquire residence in another place. Personal presence alone at another place does not determine the matter. He must remove without the intention of returning to his home as such. He must remove to another place with the intent to make it his home. See *Culbertson v. Board, etc.*, 52 Ind. 361, and cases cited; *Astley v. Capron, supra*; *Moore v. Dunning*, 29 Ill. 130.

It would seem that at the time when the appellant made the application for exemption, her husband could have made a like application "were he present;" and that if he had returned to his household and resumed his duty toward it, he would have been entitled to exercise all the privileges which are dependent upon having a residence in this State.

Upon all these considerations, we are of the opinion that the evidence showed the appellant's husband to be a resident householder, within the meaning of the statute.

The judgment, so far as it relates to said buggy and harness and in favor of the appellee John D. Kreager against the appellant, is affirmed; and the judgment in relation to the other property in question in favor of the other appellees against the appellant is reversed, and the cause as against them is remanded for a new trial.

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TODD v. DANNER.

[No. 2,188. Filed April 8, 1897.]

INSTRUCTIONS.—*Incomplete Instructions.—Remedy.*—An objection to an instruction by the court on the ground that it does not contain a full statement of the law applicable to the case, can be made available only by the aggrieved party asking the court for additional instruction to supply the supposed omission in the one given. *p. 372.*

SAME.—*As to Preponderance of the Evidence.*—An instruction to the jury that a fact or facts necessary to a recovery must appear from the plaintiff's evidence, is not equivalent to instructing the jury that a fact or facts must be proved by a preponderance of the evidence, where there was evidence introduced both by plaintiff and defendant. *pp. 373, 374.*

SAME.—*Must be Predicated Upon all the Evidence.*—An instruction must be predicated upon all the evidence given in the case on the particular matter to which it is directed. *p. 374.*

SAME.—*All Construed Together.*—If the instructions given, all taken together, present the law correctly and are not calculated to mislead the jury, the judgment will not be reversed. *p. 375.*

From the Switzerland Circuit Court. *Reversed.*

W. R. Johnston, Frank B. Shutts and Geo. S. Pleasants, for appellant.

F. M. Griffith and Vanosdol & Francisco, for appellee.

ROBINSON, J.—Appellee seeks to recover damages for personal injuries sustained by reason of appellant's alleged negligence. Upon issue joined by the general denial, a verdict was returned by the jury in appellee's favor for \$1,200.00 for which sum judgment was rendered over appellant's motion for a new trial.

The overruling of the motion for a new trial is the only error assigned.

The reasons for which a new trial was asked were that the verdict is not sustained by sufficient evidence and is contrary to law, and for error of the court in re-

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fusing to give instructions one, two, three, five, six, seven, eight, and nine, requested by defendant. Counsel for appellant, in their brief, have argued only the court's refusal to give the instructions asked.

The complaint avers that, on the 1st day of June, 1893, the appellant was the owner of a large steer, which was of dangerous and vicious disposition, hooking and attacking men and animals; all of which the appellant at the time well knew; that without disclosing, or in any manner informing appellee of the dangerous and vicious disposition of said steer to attack and injure mankind and animals, and appellee being ignorant thereof, appellant placed the steer in appellee's care and with appellant's consent turned the steer at large in appellee's pasture with appellee's cows and horses and near to appellee's residence; that while the steer was in appellee's pasture, without notice or knowledge of his dangerous disposition, and without any fault or negligence on appellee's part, appellee was attacked by the steer and severely injured.

To entitle the appellee to a verdict, he must aver in his complaint and prove the negligence of the appellant, and his own freedom from any negligence which proximately contributed to the injury. A failure in either of these particulars will defeat his right to a recovery. These principles are so well settled that the citation of authorities is unnecessary. Appellant had the right to have the jury fully instructed on this subject, and the only question here is whether that was done.

No exception was taken to any of the instructions given by the court, and they cannot be considered by us, except in so far as they do or do not, as a whole, state the law of the case and fail to cover any par-

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ticular branch of the case upon which an instruction was asked by appellant.

The court gave the jury instructions one and two, requested by appellee, as follows:

“1. In order to charge the defendant with knowledge of the vicious propensities of the animal to attack mankind, it is not necessary that he have notice that the animal has frequently ‘broken through the tameness of his nature’ into acts of aggression on man, or upon animals in the dominion and ownership of man. It is unnecessary to prove more than that the owner has good cause for supposing that the animal may so conduct itself. And if the jury find from the evidence in this case that the animal in question before the injury complained of made a vicious lunge or attack upon Samuel Vaughn or Thomas Richtor, or either of them, in the presence of the defendant, then, upon such facts, if established, you would be authorized to find that the defendant had knowledge of the vicious propensities of said animal to attack mankind, although he may not have had knowledge of attacks of said animal upon other persons.

“2. If you find the plaintiff is entitled to damages, in estimating the sum, you may take into consideration his occupation, habits of industry, health, and prospects of life at the time he received the injury, governed by ordinary human knowledge and experience, as to the age he would likely have remained capable of labor, also, the expenses incurred by him for medical attendance, nursing, loss of time, incapacity for labor, after the injury, and pain and suffering sustained by him consequent upon such injury, if, in your judgment the same is warranted by the evidence. You should look to the nature and extent of the injury inflicted, whether temporary or permanent, the circumstances under which it was inflicted, and

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then determine from the evidence what is just and proper under all the circumstances in evidence.”

Also the following instruction requested by appellant:

“4. The want of ordinary care and prudence on the part of a person injured, contributing directly and approximately to the injury complained of, is contributory negligence.”

The court of its own motion gave the following instructions:

“The complaint in this case is in two paragraphs. It is not claimed, however, that there were or are two separate causes of action. But the same cause of action is stated in somewhat different language. The defendant has filed as his answer the general denial which puts in issue the material allegations of the complaint. To recover on either paragraph of the complaint it must appear from the plaintiff's evidence, that the defendant owned the animal mentioned in the complaint, that such animal was vicious and dangerous as alleged, that the defendant had knowledge of the character of such animal and that the plaintiff did not know of such vicious character. It must also appear that the injury to the plaintiff did not result from his own contributory negligence. If you find for the plaintiff you will award him such damages as, judging from the evidence you may think he has sustained. If you find for the defendant you have only to say so in your verdict.”

The instructions above set out are all the instructions given to the jury.

Appellant's counsel, at the proper time, requested that certain instructions be given, which request was refused and exceptions taken. It is shown by the bill of exceptions that it contains all the instructions given.

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It is well settled that an objection to an instruction by the court on the ground that it does not contain a full statement of the law applicable to the case can be made available only by the aggrieved party asking the court for additional instruction to supply the supposed omissions in the one given, and if the court refuses to give such additional instruction it is the party's further duty to see that it is made a part of the record in one of the methods prescribed by law for that purpose. This was done by appellant.

It was necessary that the jury, before they could give appellee a verdict, must find that the appellant owned the animal mentioned in the complaint, that such animal was vicious and dangerous, that the appellant had knowledge of the character of the animal and that the appellee did not know of such vicious character.

Among the instructions requested by appellant and which the court refused to give, were the following:

"1. In this case the burden of proof rests upon the plaintiff.

"2. The plaintiff's alleged cause of action is set forth in his complaint, and before he can recover he must have proved by a fair preponderance of the evidence, all the material allegations of his complaint or enough of such material allegations to constitute a cause of action against the defendant.

"3. The plaintiff has alleged in each paragraph of his complaint, among other things, that he received the injury complained of without fault or negligence on his part. This is a material and necessary allegation. Without such allegation his complaint would not have been sufficient to have constituted a cause of action and before the plaintiff can recover he must have proved by a fair preponderance of the evidence that he did receive said injuries, without fault or neg-

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ligence on his part, directly and materially contributing to the injury. It is not enough to enable the plaintiff to recover that he shall have proved fault and negligence on the part of the defendant; he must also prove that he himself was free from such fault or negligence, and, if he has failed to prove by a fair preponderance of the evidence that he received the injury without such fault or negligence on his own part he cannot recover.

"5. The plaintiff has alleged in each paragraph of his complaint that the steer in question was of a dangerous and vicious disposition, in the habit of attacking mankind and animals. He has also alleged that the defendant knew of such dangerous and vicious disposition of said steer and that he, plaintiff, had no knowledge of such dangerous and vicious disposition. To entitle the plaintiff to recover he must have proved by a fair preponderance of the evidence not only that the steer was dangerous and vicious, but that the defendant knew that fact and the plaintiff was ignorant of it."

These instructions requested by appellant correctly state the law. Whether the animal in question had a vicious and dangerous disposition, which was known to the appellant and of which appellee was ignorant, were questions the jury must necessarily determine. These matters were to be determined, not from plaintiff's evidence, but by a fair preponderance of all the evidence in the case. It cannot be said that any meaning was intended in the court's instructions other than that which ordinarily attaches to the words used, or that the jury gave the language used other than its ordinary meaning. It cannot be presumed that the jury did not understand what the court told them. When the jury is told that a fact or facts necessary to a recovery must appear from the plaintiff's evidence,

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it is not equivalent to telling the jury that a fact or facts must be proved by a preponderance of the evidence given in the case where, as in this case, there was evidence introduced by both plaintiff and defendant. Instructions one, two, three and five correctly state the law, are applicable to the evidence, are not covered by any instructions given by the court, and should have been given to the jury.

The seventh instruction requested by appellant is to the effect that whether plaintiff had knowledge of the dangerous disposition of the steer is a question of fact to be determined by all the evidence. It then tells the jury what facts, if they are facts, the jury shall consider in determining plaintiff's knowledge. The effect of the language used is to limit the jury to such facts as are enumerated in the instruction and it is not claimed that the facts enumerated are all the facts the jury should consider in determining that question. For this reason the instruction was objectionable and there was no error in refusing to give it. The same objection is applicable to the eighth instruction requested. It cannot be said that either of these instructions is predicated upon all the evidence given in the case on the particular matter to which each is directed, but the tendency of each is to restrict the consideration of the jury to isolated facts, which, by implication at least, exclude all other facts from the jury. The eighth instruction is open to the further objection that it invades the province of the jury. It in effect tells the jury that if they find from the evidence certain facts set out in the instruction then from the facts so found they shall find certain other fundamental facts which are set forth.

The sixth instruction requested by appellant could have no application to any question to be determined by the jury, unless it be the question of contributory

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negligence, and upon that question it is incomplete and obscure and was properly refused. Nor do we think there was any error in refusing to give the ninth instruction asked for, conceding, without deciding, that it correctly states the law as applicable to the evidence, the substance of it is contained in other instructions given.

We are not unmindful of the rule that if the instructions given, all taken together, present the law correctly and are not calculated to mislead the jury, the judgment will not be reversed. But when the court refuses upon request to instruct the jury that certain essential elements in plaintiff's case must be shown by a fair preponderance of all the evidence and that the burden of proof rests upon the plaintiff, but does instruct the jury that these essential elements must appear from plaintiff's evidence; we cannot say that the instructions given present the law correctly, nor that they were not calculated to mislead the jury.

Judgment reversed with instructions to sustain the motion for a new trial.

FIRST NATIONAL BANK OF MARION v. ADAMS SCHOOL TOWNSHIP, ET AL.

[No. 2,145. Filed April 8, 1897,]

COMPLAINT.—School Supplies.—Averment as to Necessity Of.—Where a complaint against a school township to recover for supplies sold to the trustee thereof shows on its face that the supplies purchased and delivered to the township are wholly unauthorized by law, such complaint cannot be made good by an averment that such supplies were useful and necessary for the thorough organization and efficient management of such schools. *p. 382.*

TOWNSHIP TRUSTEE.—Not Authorized to Purchase "Reading Circle Books" for use of Pupils.—A township trustee has no authority to purchase on account of his township "reading circle books" for the

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individual use of pupils, even though such books were useful and necessary; as they have no place in or connection with the schools within the meaning and provisions of the law. *pp. 381-385.*

From the Madison Superior Court. *Affirmed.*

C. L. Henry, E. B. McMahon and J. A. Van Osdol,
for appellant.

F. A. Walker and F. P. Foster, for appellee.

WILEY, J.—The appellee, George M. Ray, sold to his co-appellee, Adams School Township, through its trustee, five hundred “reading circle books,” at one dollar each. September 21, 1894, the trustee issued to said Ray a township warrant or order for five hundred dollars in payment for such books, which order matured June 15, 1895, bearing 8 per cent. interest from date. Soon after the issuing of said township warrant, and before its maturity, said Ray transferred it by delivery to the appellant.

The complaint is in two paragraphs, the first of which counts upon the warrant, while the second wholly ignores the warrant and is based upon the *quantum meruit*, as for goods sold and delivered. In the second paragraph of the complaint it is averred that “on the 27th day of September, 1894, the said George M. Ray sold and transferred to this plaintiff all of his right, title and interest in his account and demands against said school township on account of the goods and supplies so furnished said school township.”

Each paragraph of the complaint contains the following averment: “That said books so purchased by said Adams School Township were for the use of said school township and were useful, suitable and necessary, and for the benefit and use of the schools of defendant township, and were reasonably worth the

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sum of five hundred dollars; * * * that the same were necessary for the thorough organization and efficient management of the schools of said defendant township, and were such as said school township, through its trustee, was authorized to purchase; that the same were delivered to the defendant township for use in the schools of said township."

The second paragraph of the complaint contains the additional averment that said books were "accepted by said school township and have ever since been in use in the schools of said township."

The appellee, Adams School Township, challenged the sufficiency of each paragraph of the complaint, by a demurrer, which the court sustained, and the appellant refusing to plead over, judgment was rendered against it for costs.

The correctness of this ruling of the court upon the demurrer, the appellant questions by its first and second assignments of error.

In determining the liability of the appellee township under the facts alleged, we must look to the statutes defining the powers and authority conferred upon township trustees in the management of the schools, to bind their townships for the supplies mentioned and described in the complaint.

The office of township trustee is wholly a statutory one, and the rule prevails that such trustee has no power to act, or authority to bind his township that is not delegated to him by statute. His authority will not be extended, nor his powers enlarged, either by intendment or by any strained construction of the statute. If he is authorized by statute to purchase the books described in the complaint, and they were useful and necessary for the organization, management and conduct of the schools, then the township is liable, and must respond in damages; but if he had no

authority to purchase them, his contract with the appellee, Ray, was absolutely void, and cannot be enforced against the appellee township, notwithstanding the fact that the action is prosecuted by an innocent purchaser of the order or warrant.

Appellant relies upon section 5920, Burns' R. S. 1894 (4444, R. S. 1881), in support of its contention that the appellee township is liable upon the facts averred in its complaint. That section is as follows: "The trustees shall take charge of the educational affairs of their respective townships, towns, and cities. They shall employ teachers; establish and locate, conveniently, a sufficient number of schools for the education of the white children therein; and build, or otherwise provide, suitable houses, furniture, apparatus and other articles and educational appliances necessary for the thorough organization and efficient management of said schools," etc.

Under the provisions of this statute appellant insists that it is as much within the province of the school trustee to buy suitable apparatus, appliances and articles necessary for the thorough organization and efficient management of the school, as it is to provide schoolhouses and employ teachers. With this insistence we heartily concur. But we cannot hold that the statute makes the trustee the sole judge or arbiter as to what are suitable apparatus and other articles and educational appliances necessary for the thorough organization and efficient management of the schools. To so hold would be to confer upon such trustee unlimited power and authority in such matters, and this would be a dangerous rule, and in all probability, in many instances, lead to grave results and serious complications. We are quite clear that the legislature never intended to confer such authority upon school trustees.

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Appellant contends that the provisions of section 5925, Burns' R. S. 1894 (4446; R. S. 1881), which authorizes two or more school trustees, in distinct municipal corporations, to establish graded schools, to purchase suitable grounds and erect buildings thereon, is no broader in defining the powers of school trustees than section 5920, *supra*, and grounds its contention on the case of *Craig School Tp. v. Scott*, 124 Ind. 72, in which it was held that it makes the trustees the sole judges of the propriety and advisability of establishing such graded schools and of purchasing real estate for that purpose.

In that case, the court, speaking by Olds, J., said: "This section of the statute contemplates and authorizes the trustees of two or more school townships to join together and to purchase real estate suitable for graded school purposes, and to establish graded schools. It makes the trustees the judges of the propriety and advisability of establishing such graded schools and of purchasing real estate for that purpose."

We do not think that these two sections of the statute are at all analogous. The former, in general terms, defines the authority, duty and power of trustees, while the latter, in express terms, empowers the trustees jointly to establish joint graded schools, to purchase suitable real estate and erect buildings thereon, and hence the case of *Craig School Tp. v. Scott*, *supra*, is not in point.

Townships are involuntary political or civil divisions of the State, and are created by general laws to aid in the administration of the general State government. The township trustee is *ex officio* school trustee of his township, and his powers are limited, being created and defined by statute. For an act done by such school trustee not within the scope of his statu-

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tory power, and where he has no authority to act at all, his township is not liable. *Board, etc., v. Fertich*, 18 Ind. App. 1; *Snoddy v. Wabash School Tp., ante*, 284; *Board, etc., v. Allman*, 142 Ind. 573; *State, ex rel., v. Hart*, 144 Ind. 107; *Board, etc., v. Hemphill*, 14 Ind. App. 219.

A school trustee, like the board of county commissioners, whose duties are defined and circumscribed by statute, cannot do any act which is not either expressly or impliedly authorized by statute. *Board, etc., v. Fertich, supra*; *Gavin v. Board, etc.*, 104 Ind. 201; *Board, etc., v. Barnes*, 123 Ind. 403.

The rule is well settled in this State that persons contracting with school trustees are bound to know that their powers to contract are limited by statute, and that beyond such limit they cannot go and bind their townships.

In *Bloomington School Tp. v. The National School Furniture Company*, 107 Ind. 43, the court, speaking by Howk, C. J., said:

“In the execution of the written contract, which is made the basis of the complaint in this case, appellee was affected with notice of the limited powers of appellant’s trustee, under our laws. Such trustee does not and cannot act as the agent merely of his township. He is a public officer, and his relations to his township, as the name of his office clearly imports, are all of a fiduciary nature. In dealing with such trustee, all persons are bound to take notice of his official and fiduciary character, and to know that he can only bind his township by his contracts, verbal or written, when it appears, or is shown by proper averment and proof, that such contracts are authorized by law.”

In *Honey Creek School Tp. v. Barnes*, 119 Ind. 213, the court, speaking by Olds, J., said: “School townships are corporations with limited statutory powers,

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and all who deal with a trustee of a school township are charged with notice of the scope of his authority, and that he can bind his township only by such contracts as are authorized by law." See, also, *Reeve School Tp. v. Dodson*, 98 Ind. 497; *Union School Tp. v. Bank, etc.*, 102 Ind. 464; *Pine Civil Tp. v. Huber Mfg. Co.*, 83 Ind. 121; *Axt v. Jackson School Tp.*, 90 Ind. 101.

It has been expressly held that a township trustee has no authority to purchase on account of his township the ordinary, usual and general text-books used by pupils in the schools. *Honey Creek School Tp. v. Barnes et al.*, *supra*.

Under the holding in this case, a school trustee is inhibited from purchasing for the individual pupils the general text-books provided by statute and used in the schools, and yet we know that such books are suitable and necessary, etc.

There is no law in this State which even contemplates that trustees are clothed with such power, except the act approved March 8, 1897, which provides for compulsory education under certain conditions, which act is not yet effective, and then the school trustees are only authorized to purchase such necessary text-books for the use of indigent and poor children.

The case last cited and the principle therein announced, it seems to us, are controlling here, for the reason that books for a "reading circle" are of necessity for the individual use of pupils, and this fact being apparent upon the face of the complaint, and in the very nature of the relations existing between the schools and the "reading circles" contemplated, takes it out of the rule as announced in many cases in this State, that a complaint will be held good where it is averred that the supplies, apparatus, etc., furnished

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and delivered to a school township were useful and necessary and were for the use and benefit of such schools and the further averment that they were necessary for the thorough organization and efficient management thereof.

If a complaint on its face, as in the case at bar, shows that the supplies purchased by and delivered to the township, are wholly unauthorized by law, such complaint cannot be made good by averment that such books, etc., "were useful and necessary for the thorough organization and efficient management of such schools."

The court takes judicial knowledge of the constitution and laws of the State, and hence we judicially know that there is no provision in either the constitution or the statutory law, for the organization, control and management of "reading circles" as a part and parcel of, or in connection with the educational system of the commonwealth. Our public school system finds its foundation in the constitution and it has progressed and been fostered and protected by legislation, until it has reached a prominence and perfection which is the common pride of all, and the encouraging hope of the future. It has not only a place in the constitution and laws of the State, but it is firmly enshrined in the hearts of her people. The entire government, management and control of the public schools is regulated by statute. The course of study, the branches to be taught, and even the qualifications of teachers are the subject of legislative enactment. We find no statute which authorizes, directs or permits that organized "reading circles" are a part and parcel of the system, and the law cannot be so construed that the revenues collected by taxation, or otherwise, with which to support and maintain the schools, can be diverted into different channels, and

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thus be dissipated in the purchase of "reading circle books."

The court takes knowledge of the current, and common history of the State, and, hence, we know that in 1887, the Indiana Teachers' Association, organized a "Young People's Reading Circle," the object of which was to select and put into the hands of young people, books of high character and morals, to the end that vicious tastes and habits might be thwarted by the positive influence of good that would follow such a course. We know, also, that these reading circles have, in many instances, been organized in connection with the public schools, not as a part of the schools, but wholly independent, and great good has resulted therefrom. We further know, as a part of the common history of the State, that the management and control of such "reading circles" is under, directed, and supervised by many of the best and most renowned educators of the land; that the books for use therein are selected with great care by a committee chosen for that purpose, and that the most wholesome results have followed these labors; but we cannot extend either by intendment or construction, the plain provisions of the statute, so that every designing sharper, shrewd manipulator and bold and unscrupulous speculator, shall constitute himself a special committee to select the literature for the young people of our State; to call such selection "reading circle books;" to go in and out among the unwary, but honest, trustees, and say to them that such books as selected by them, are necessary for the thorough organization and efficient management of the schools, and thus induce such trustees, out of the public funds, to purchase them, even at any price.

The history of the past, the progress made by our schools, common judgment, and the plain provisions of the statute itself, teach us that a "reading circle"

library as contemplated by the averments of the complaint, and the books as furnished by the appellee, George M. Ray, is and are not necessary for the thorough organization and efficient management of the common schools.

The proposition that a school trustee has unlimited authority to purchase books for a "reading circle," and that he is the sole judge of their merits and adaptability to the mind of the youth of the land, and of their necessity and benefit to the schools, is too preposterous for argument. If that were true, then he could purchase all the light, trashy and immoral literature of the age; he could select the life of Jesse James as an eminently fit book for young men and youths of the State, and could bind his school township to pay for such books, by simply averring that they were "reading circle books," were useful and essential, and necessary for the management and efficient control of the schools.

Courts will not lend themselves to such vagaries, and thus aid in prostituting the public school system from its lofty and noble purposes, or poisoning the minds of the youth of the land by aiding in putting into their hands this character of literature.

The case in hand is not strengthened by the averment in the complaint that the goods so furnished were such as said school township had a right to purchase, for it affirmatively appears on the face of the complaint, that it had no right whatever to purchase them.

We do not lose sight of the fact that in construing section 5920, *supra*, it has been held that a township trustee may purchase for his schools blackboards, maps, charts, tellurians, dictionaries, books of reference, manikins, etc., but, as was said in *Honey Creek School Tp. v. Barnes, supra*, it is going to the very border-line of construction so to hold.

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Such purchases were upheld on the sole ground that they were books, maps, etc., of reference, and were to be used in common by all the pupils of the schools. In the case last cited, the court, speaking by Olds, J., said: "Blackboards, charts, maps, tellurians and dictionaries are a class of articles, apparatus and books which are not required for each individual scholar, but one of each would be sufficient, in most instances for the whole school, and could be used by the teacher in giving instructions to the pupils. No person being required to furnish such common property for the benefit of the whole school, they can only be supplied by the trustees."

The appellant has not, by the averments of its complaint, brought itself within the rule established by the decided cases. We are not advised by any averment in the complaint as to the character of the books that were purchased, and it is not sufficient to say that they were useful and necessary and that they were such books as the township was authorized to purchase, for they have no place in, or connection with the schools, within the meaning and provisions of the law.

A school trustee has no official connection with the "Young People's Reading Circle," and is not charged with any duty in relation thereto, and the purchase of the books described in the complaint by appellee township's trustee, for such "reading circle," even though it be under the guise that they were for the use and benefit of the schools, cannot be sustained by the law, nor upheld by the courts.

There was no error in sustaining appellee township's demurrer to the complaint.

The judgment is affirmed.

BLACK, COMSTOCK and ROBINSON, JJ. We concur in the conclusion reached.

Lake Erie and Western Railroad Company v. Bates.

LAKE ERIE AND WESTERN RAILROAD COMPANY
v. BATES.

[No. 2,168. Filed April 8, 1897.]

APPEAL AND ERROR.—Exception.—Where no exception was taken to the action of the court in sustaining a demurrer to a paragraph of answer no question is presented to this court on such ruling. *p. 387.*

SAME.—Sufficiency of Notice to Correct Record in Court Below.—No question can be raised in this court as to the sufficiency of notice of a motion to correct the record in the court below or the legality of any of the proceedings therein where no objection was made or exceptions taken to such proceedings. *pp. 387, 388.*

SAME.—Certiorari.—A corrected record of the trial court is properly brought to the Appellate Court by writ of *certiorari*. *p. 388.*

From the Howard Circuit Court. *Affirmed.*

J. B. Cockrum, W. E. Hackedorn, George Shirts and I. A. Kilbourne, for appellant.

A. J. Behymer, Fippen & Purvis and Moon & Wolf, for appellee.

HENLEY, J.—This action was brought by the appellee against the appellant to recover alleged damages for being wrongfully ejected from one of appellant's trains. A demurrer to the complaint was overruled to which appellant excepted, and thereupon filed an answer in four paragraphs. To the second and third paragraphs of answer, a demurrer was sustained. Appellee replied. The cause was submitted to a jury. A special verdict was returned, and upon motion therefor, judgment was rendered thereon in favor of the appellee.

The errors assigned are (1) overruling of the demurrer to the complaint; (2) sustaining the demurrer to the second paragraph of answer; (3) sustaining the

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demurrer to the third paragraph of the answer; (4) overruling appellant's motion for judgment on the verdict; and (5) sustaining appellee's motion for judgment on the verdict.

But two alleged errors are discussed by appellant's counsel in their brief. These are the sustaining of the demurrer to the second and third paragraphs of the appellant's answer.

Counsel for appellee contend that the record shows that no exception was taken to the action of the lower court in sustaining appellee's demurrer to either the second or third paragraphs of appellant's answer.

If this be true, we cannot consider the argument of counsel regarding the sufficiency of these answers. *Bond v. Holloway* (Ind. App.), 46 N. E. 358; *Fleming v. McClaffin*, 1 Ind. App. 537; section 640, Burns' R. S. 1894.

In the record in this case as first filed in this court, is the following entry: "And the court being well advised of the demurrer to the second, third and fourth paragraphs of answer, sustains the same as to the second and third paragraphs, to which ruling defendant excepts."

Afterwards and during the pendency of this appeal, appellee filed the following motion to correct the record in the court below: "State of Indiana, Howard county, Circuit Court, October term, 1896. Abraham L. Bates v. the Lake Erie & Western Railroad Company.

"The plaintiff respectfully shows to the court that on March 27, 1896, in this case the court sustained a demurrer filed by the plaintiff to the second and third paragraphs of the defendant's answer. That said ruling was made with the consent of the defendant in open court at the time, and no exception was taken thereto. That no exception to such ruling was entered

upon the minutes of the court or upon any docket kept by the court or clerk, but the clerk of this court has erroneously and without right entered upon the order-book entry of the said proceedings of the court a statement 'to which ruling defendant excepts.' And the plaintiff now moves the court to correct said entry by the clerk *nunc pro tunc* so as to conform to the minutes of the court. A. J. Behymer, Fippen & Purvis, Moon & Wolf, attorneys for plaintiff."

Notice was given appellant of such motion and appellant appeared. A hearing was had and the lower court entered judgment correcting the record as prayed for in said motion. It appears, also, that the appellant took no exception nor in any way objected to the proceeding to correct the record, although appearing by counsel.

No question is thus raised as to the sufficiency of the notice or the legality of any of the proceedings to correct the record.

Appellee then applied to this court and obtained a writ of *certiorari* and brought the corrected trial court record to this court.

We think the proper steps were taken to correct the record and to bring it to the Appellate Court.

Elliott's App. Proced., section 207, says: "Where a trial court record is corrected or amended upon an application there filed, the amendment or correction becomes part of the original record in legal contemplation, and the party desiring its presentation on appeal should apply for an order to have it certified to the appellate tribunal. The application to the trial court to amend or correct the record when made pending an appeal is not, as a general rule, to be considered as an independent proceeding, but it is to be deemed such an incident of the original case as to con-

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stitute an integral part of it. Theoretically, at least, there is only the one case and one appeal. If the application to amend is denied by the trial court, or if wrongly granted, the rulings and papers should be brought to the higher court as part of the original appeal." See, also, *Jelley v. Gaff*, 56 Ind. 331.

The record as corrected shows that no exception to the ruling upon the demurrer directed to the second and third paragraphs of appellant's answer was taken by appellant.

This court cannot, therefore, consider the correctness of the ruling of the lower court as questioned by the second and third specifications of the assignment of errors.

The other errors assigned not being argued are deemed to have been waived.

Judgment affirmed.

HAMILTON ET AL., EXECUTORS, *v.* TONER.

[No. 1,988. Filed April 9, 1897.]

BANKS AND BANKING.—*Death of Depositor.—Fraudulent Concealment of Deposit.*—A banker with whom a deposit is made is not guilty of such fraud as will make him liable in damages to the sole heir of depositor by inquiring of her after the death of depositor concerning the condition in which the business affairs of deceased were left, saying nothing about the deposit, and with knowledge of the heir's ignorance of such deposit making a demand upon her for a claim against such depositor's estate and accepting her check on another bank in payment thereof, the bank having paid the amount of the deposit upon demand and prior to the commencement of the action for damages.

From the Johnson Circuit Court. *Reversed.*

Adams & Carter, for appellants.

J. B. McFadden and *Miller & Barnett*, for appellee.

Hamilton et al., Executors, v. Toner.

COMSTOCK, C. J.—This action was brought against appellants as the personal representatives of the estate of Samuel Hamilton, deceased, for the recovery of damages which appellee claims to have sustained by reason of the alleged wrongful conduct of the decedent toward her with reference to certain money which was deposited with said decedent by one George C. Thatcher.

The complaint is, in substance, as follows, to-wit: In January, 1885, George C. Thatcher deposited with one Samuel Hamilton, who was at the time the owner of a bank and engaged in the banking business, \$915.00; that afterwards, in said month, said Thatcher died intestate, unmarried, and leaving the plaintiff as his sole heir at law; that no letters of administration have ever been granted on his said estate; that within a few days after the death of said Thatcher she made diligent search for all books and papers belonging to said estate in all places where said deceased, while in life, was in the habit of keeping the same, or where he was likely so to do, and she made careful examination of all she found; but that she neither found nor learned anything whatever that the said Thatcher had any money deposited in said bank, or that said Hamilton was in any way indebted to said Thatcher's estate; that within a short time after the death of said Thatcher, she caused to be published over her own signature in the Shelbyville Democrat, a newspaper of general circulation, printed and published at said city, a notice, asking all persons having claims against said estate to present them for payment, and that all persons knowing themselves to be indebted to said estate should pay the same to her; that in default thereof the same would be placed in the hands of an attorney for collection; that at the time of the death of Thatcher she was wholly ignorant of the fact that

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there had been any money belonging to said estate deposited in said bank, or in which said estate had any interest, or that Hamilton was in any manner indebted to said estate; of which fact said Hamilton at that time had full knowledge; that she did not ascertain said fact until in July, 1893, and long after the death of said Hamilton; that soon after the death of said Thatcher, said Hamilton asked her how he left his business affairs, how she was succeeding in collecting the claims due said estate, and, for the purpose of ascertaining whether plaintiff had any knowledge of said money, he asked her if she was certain that she had possession of all books and papers belonging to said Thatcher's estate; that he did not then nor at any time inform her or intimate that he had or ever had any money deposited in his bank in which Thatcher had any interest; but that he wrongfully concealed said fact from her; that she learned of said deposit from a source wholly outside said bank or said executors, in July, 1893; that in March, 1892, the said Hamilton demanded of her the payment of a claim of \$425.19 in favor of himself and against plaintiff as the only surviving heir at law of the said Thatcher, he knowing that she was the only heir at law of the said estate and that no letters of administration had ever been issued thereon; for which she executed to the said Hamilton her check on the First National Bank of Shelbyville in payment thereof, and which was by said bank paid to said Hamilton; that from the 26th day of January, 1885, until the — day of May, 1892, said Hamilton wrongfully converted said money to his own use, knowing that plaintiff was ignorant of the fact that it had been deposited in his bank, and he wrongfully concealed the same from her; that during that time the use of said money had been worth to her 8 per cent. per annum; that during all that time

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said Hamilton had drawn interest on the same in excess of that amount; that prior to 1890 she had paid the debts due from said Thatcher or his estate; that upon learning that said sum had been deposited in said bank, she demanded payment of the executors of said Hamilton's estate of said money, whereupon said executors paid to her on account of said deposit the amount of the principal of said sum, \$915.00, but refused to pay her any interest thereon for the use of said money, whereby she has been damaged in the sum of \$670.00 for which she demands judgment.

A demurrer upon the ground that the complaint did not state facts sufficient to constitute a cause of action was overruled and exceptions taken. A trial had, resulting in a verdict and judgment for appellee for \$450.00. A motion for a new trial was made, overruled and exceptions taken. The errors assigned are, first, the overruling appellant's demurrer to the complaint; second, overruling motion for a new trial.

When Thatcher deposited his money with Hamilton, the relation of debtor and creditor was at once created. The money became the property of Hamilton. *McLain v. Wallace, Rec.*, 103 Ind. 562; *Harrison, Rec., v. Wright*, 100 Ind. 515. It was payable to Thatcher at the bank of the latter upon written order, during business hours, unless a different agreement was made as to its payment.

A banker is not bound to seek his depositor as is the ordinary debtor to seek his creditor. He is not bound to pay upon an oral order. *McEwen v. Davis*, 39 Ind. 109.

Thatcher died without having made any demand for this money. After his death, appellee as his sole legal heir demanded and received of appellants \$915.00, the full amount of said deposit. Was not this a complete performance of the contract entered into between

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Hamilton and Thatcher? Hamilton did not contract to pay the identical money deposited with him, but to hold himself in readiness to pay upon proper demand an amount equal to that deposited. This contract could not be changed but by the consent of both parties. Hamilton and Thatcher being dead, the appellants and appellee are their respective representatives. Wherein are the rights of appellee greater or different than that of Thatcher? It cannot be contended that Thatcher could have maintained this suit unless he had demanded and been refused payment. Had Hamilton refused the payment, the remedy of Thatcher would have been by suit on contract to recover damages for the breach. He could not have been sued for conversion, for the money became his own.

Conversion is the wrongful exercise of dominion over property in denial of the owner's rights.

If Thatcher had lived without demanding payment to the time when appellee demanded the money, he could not, had payment been refused, have maintained a suit for more than the amount of his deposit with interest thereon from the date of the refusal. Had he forgotten that he had deposited the money with Hamilton, the obligation of Hamilton would not have been affected by such lapse of memory, because their relations were those of contract and their respective rights and liabilities were fixed by law.

When one does nothing but what the law authorizes him to do, he commits no legal wrong. *Habig v. Dodge*, 127 Ind. 37.

The money being Hamilton's he could not become a wrongdoer by using it, for he was only using his own. He could commit no tort by refusing to pay it, for in so doing he would merely violate his contract, for which the remedy would be a suit on contract, the measure of damages being the amount of the deposit

and interest thereon from the time of the refusal to pay.

"There are also, in certain relations, duties imposed by law, a failure to perform which is regarded as a tort, though the relations themselves may be formed by contract covering the same ground." Cooley on Torts, pages 105, 106.

"At the foundation of every tort must lie some violation of a legal duty, and therefore, some unlawful act or omission." Cooley on Torts, p. 104, note and authorities there cited.

Hamilton held the money under a contract entered into without any fraud or fraudulent representations. No trust relations existed between the parties to the contract. None, therefore, could exist between Hamilton and appellee.

Hamilton was simply a debtor from whom a debt was payable upon demand.

Appellee as sole heir at law of Thatcher demanded and received the \$915.00 by virtue alone of the contract made by Thatcher and Hamilton. She now seeks in tort to enforce a claim dependent upon, and a mere incident of said contract, from which we think it cannot, in law, be separated so as to maintain an action different in kind from that through which the principal might have been recovered.

In discussing this question, Mr. Pomeroy, in his Remedies and Remedial Rights, section 558, says:

"By far the most important distinction directly connected with this doctrine is that which subsists between causes of action *ex contractu* and those *ex delicto*. It is settled by an almost unanimous series of decisions in various states, that if a complaint or petition in terms alleges a cause of action *ex delicto*, for fraud, conversion, or any other kind of tort, and the proof establishes a breach of contract express or implied, no

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recovery can be had, and the action must be dismissed, even though by disregarding the averments of tort, and treating them as surplusage, there might be left remaining the necessary and sufficient allegations, if they stood alone, to show a liability upon the contract." See *Cincinnati, etc., R. R. Co. v. Harris*, 61 Ind. 290.

Hamilton contracted to pay Thatcher \$915.00 on demand. Appellee claims in this action, as interest and damages, the amount which said sum would have produced. If appellee is entitled to recover on her claim in this action, it must be because of the failure to pay the \$915.00 according to the terms of the contract entered into by Hamilton and Thatcher when the deposit was made. The \$915.00 could not have been collected in an action in tort, and, therefore, an incident to or a claim arising in consequence of the failure to pay the principal cannot be collected in tort. *Bennett v. McIntire*, 121 Ind. 231, 6 L. R. A. 736.

Does the complaint state facts sufficient to make it good as a complaint in tort for the fraud of Hamilton?

In charging fraud it is not sufficient to say that a thing was fraudulently done, nor "to heap up epithets." The facts constituting the fraud must be set out. *Curry v. Keyser*, 30 Ind. 214; *Ham v. Greve*, 34 Ind. 18.

These facts are to be considered upon the proposition that the relation of debtor and creditor alone existed between Hamilton and Thatcher, and that therefore the relation of trust does not exist between Hamilton and appellee, as heretofore stated. *McLain v. Wallace, Rec., supra*; *Harrison, Rec., v. Wright, supra*.

The facts averred which aspire to show fraud are, that soon after the death of Thatcher, Hamilton

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called upon appellee and asked her how he left his business affairs, how she was succeeding in collecting the claims due said estate, and for the purpose of ascertaining whether plaintiff had any knowledge of said money, asked her if she was certain that she had possession of all books and papers belonging to said Thatcher's estate; that he did not at any time inform her that he ever had any money deposited in his bank in which Thatcher had any interest, but that he wrongfully concealed said fund from her; that in March, 1893, while said money was on deposit in his bank, Hamilton demanded of her the payment of a claim of \$425.19 in favor of himself, and against plaintiff, as the only surviving heir at law of said estate, he knowing that she was the only heir at law of said estate, and that no letters of administration had ever been issued thereon; that she executed to Hamilton her check on the First National Bank of Shelbyville in payment of said claim on which he received the money; that Hamilton knew that she was ignorant that said money had been deposited in his bank. These are the only acts or utterances of Hamilton upon which can be predicated a charge of fraud.

The death of Thatcher, as we have heretofore stated, did not change the obligation of Hamilton, but, if it did, and made the money due at once to appellee, his simple failure to pay could not be said to be a fraud. It is not charged that in his conversation with her he made any misrepresentation. There was no deceit in the inquiry as to what she was doing and how she was succeeding in collecting the claims in favor of Thatcher's estate. It was certainly not a fraud to present to, and ask payment of appellee of a valid claim, nor was it a fraud to accept in payment a check upon a fund on deposit in a bank other than his own. It is true, as stated in the able and ingenious brief,

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of appellee's counsel, that a bank may apply money held by it on general deposit to the payment of a debt due it from the depositor, but the bank is not required to do so. See *Second Nat. Bank, etc., v. Hill*, 76 Ind. 223; *Scott v. Shirk*, 60 Ind. 160.

He might, without submitting himself to the charge of improper motives, assume, under the circumstances, that appellee was in possession of the bank book of the deceased, that she knew of the deposit, and that she elected to draw upon another fund. This act took place seven years after the death of Thatcher—years after the conversion is charged.

There is no allegation in the complaint that she was deceived by, or relied upon anything that Hamilton did or said. We think the complaint should have contained these averments. *Hagee v. Grossman*, 31 Ind. 223; *Hess v. Young*, 59 Ind. 379; *Rigelow on Fraud*, p. 3.

Hamilton holding the money by virtue of a contract with Thatcher, which did not obligate him to pay it until demand was made by someone having authority, he could not be charged with fraud for doing what, under the contract, he had a right to do.

It is said in *Coppage, Admr., v. Gregg*, 127 Ind. 359: "It is sufficient to say that, eliminating from the pleading the allegations charging fraud and fraudulent intent, and looking at the facts themselves, it does not appear that either of the appellees did a single thing that the law prohibited them from doing, and, under such circumstances, it has been well said that 'Fraud cannot be predicated upon acts which the party charged has a right by law to do, nor upon the non-performance of acts which by law he is not bound to do, whatever may be his motive, design or purpose, either in doing or not doing the acts complained of.'"

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Reiter v. Cumback, 1 Ind. App. 41; *Franklin Ins. Co. v. Humphrey*, 65 Ind. 549, 32 Am. Rep. 78.

For the foregoing reasons, and upon these authorities, we are of the opinion that the complaint is not good in tort for the fraud of Hamilton.

Had fiduciary relations existed between Hamilton and Thatcher, the obligations of Hamilton would have been radically different and he would then have owed a duty to appellee not imposed by the existing relations. It would then have been his duty to have informed her of all facts known to him concerning business with which he was connected and in which she had a pecuniary interest.

The second assignment of error is the overruling of appellant's motion for a new trial. This motion embraces forty-six reasons, chiefly relating to instructions given and refused.

Believing as we do that the learned court who presided at the trial below erred in overruling the demurrer to the complaint, and that the errors complained of in the second assignment of errors are not likely to occur upon a second trial, we do not deem it necessary to pass upon all of them.

The 43d reason is "The verdict is not sustained by sufficient evidence."

If the complaint is good in tort, on the theory that Hamilton was guilty of a wrong, then to sustain the verdict the evidence should show that he was guilty of the alleged acts constituting the wrong. If there is no evidence in support of such allegations, the verdict would be contrary to the evidence.

There is no evidence that Hamilton ever had any conversation, nor that he ever in person had any communication with appellee after her brother's death. There is no evidence that he ever read in any paper the notice which the complaint alleges she caused to

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be published in a Shelbyville newspaper in reference to her brother's estate. There is no evidence that he knew that Thatcher died intestate. There is no evidence that he said anything or did anything to prevent her getting the \$915.00.

The only evidence showing any business transaction between Hamilton and appellee is to the effect that Thatcher had conveyed to Hamilton by warranty deed a piece of real estate, the title to which had failed; that he had been compelled to expend money in perfecting his title, and that he had agreed to take from the representative of those who had warranted the title to him what it had cost him to purchase the outstanding title, and that a short time before his death he had sent his agent to appellee and settled with her, as the heir at law of Thatcher, on that basis, and in so doing received a check on a bank in Shelbyville other than his own, mentioned in the complaint.

We have examined the authorities cited in the able brief of counsel for appellee upon this and the other branches of this case; they show there may be circumstances under which the silence of a party may amount to fraud. We do not think that they apply to the facts in this case. It is in evidence that a bank book had been given Thatcher showing his account. There is no evidence that Hamilton knew that appellee did not have it in her possession and therefore did not know of this deposit. Under the circumstances his acceptance of a check on the First National Bank of Shelbyville, and his silence as to the deposit in his bank, against which appellee might have checked, was not a fraud.

The judgment is reversed and the cause remanded with instructions to sustain the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

THE DEERING HARVESTER COMPANY v. PEUGH ET AL.

[No. 2,051. Filed Jan. 18, 1897. Rehearing denied April 9, 1897.]

PRINCIPAL AND SURETY.—*Conditional Execution of Note by Surety.*—

One who signs a promissory note as surety with the express understanding that he shall have a certain responsible co-surety, which fact is known to the payee of the note at the time of accepting the same, will not be bound upon the contract unless the condition as to the additional surety imposed upon the principal and known to the payee is fully and strictly complied with before delivery of the instrument. p. 408.

OATH.—*Upon Belief.*—A statement sworn to upon the belief of affiant is equivalent to one sworn to in absolute terms. p. 409

From the Washington Circuit Court. *Affirmed.*

Alsbaugh & Lawler and *Frank W. Babcock*, for appellant.

M. B. Hottel, Mitchell & Mitchell and *Harvey Morris*, for appellees.

HENLEY, J.—This was an action brought by the appellant in the court below, against the appellees, upon a promissory note. Andrew J. Peugh, who was the principal in the note sued on, making no appearance to the action, judgment was rendered against him by default for the amount due.

Appellee, John A. Zaring, answered the complaint in three paragraphs, to each of which appellant filed a demurrer, which demurrer was by the court overruled to each paragraph of answer. The cause was put at issue by appellant filing a general denial to the first and second paragraphs of the separate answer of John A. Zaring. There was a trial by the court and a finding in favor of appellee, Zaring.

The errors assigned by appellant are the overruling

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of the demurrers to the first and second paragraphs of the separate answer of appellee, Zaring, and that the court erred in overruling appellant's motion for a new trial.

The first and second paragraphs of the answer of appellee are in fact the same, they are special pleas of *non est factum*, and are both properly verified. The first paragraph of answer is as follows: "The defendant, John A. Zaring, for separate answer to the plaintiff's complaint, says that he admits that he signed the note sued on, and mentioned in plaintiff's complaint, but he says that he signed the same solely as surety for his co-defendant, Andrew J. Peugh, and under the express understanding and agreement with said Peugh that said note was not to be delivered to the plaintiff, or any one for the use of the plaintiff, until one Charles McClintock had also signed said note as co-surety with the defendant; and that said Peugh promised and agreed with this defendant that said note should not be delivered to plaintiff or to any one for plaintiff's use until said McClintock had signed said note as co-surety with the defendant; and that said Peugh thereupon took said note away with him for the purpose of procuring the signature of said McClintock, pursuant to said promise and agreement; but that said McClintock failed and refused to sign said note; and defendant further says that afterward the agent of plaintiff, representing and acting for plaintiff, with full power and authority from plaintiff, took said note from said Peugh, and that said agent took said note with full knowledge of the agreement and conditions under which the defendant had signed the same, and that at the time said agent so took said note, said Peugh informed him that it was not to be delivered to plaintiff, or to any one for plaintiff's use, until said McClintock had signed it as co-surety with

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this defendant; but, notwithstanding such information and over the objection of said Peugh, said agent took said note into his possession, all in violation of the said promise and agreement by and between this defendant and the said Peugh, and with full knowledge of the same, as defendant is informed and believes. Wherefore, defendant prays that plaintiff take nothing as to him, and judgment for costs, and all other proper relief."

It is settled beyond question in this State that one who signs a promissory note as surety with the express understanding that he shall also have other responsible co-sureties, which fact is known to the payee of such note at the time of accepting the same, will not be bound upon the contract unless the conditions as to additional sureties imposed upon the principal and known to the payee are fully and strictly complied with before delivery of the instrument. *Allen v. Marney*, 65 Ind. 398, and cases cited therein; *Markland Mining, etc., Co. v. Kimmel*, 87 Ind. 560.

The first paragraph of the answer avers that appellee agreed to become surety upon said note only upon condition that one Charles McClintock would become a co-surety with him; that appellant knew of this condition imposed by him upon the principal, Peugh; and that appellant, with this knowledge, accepted the note without the signature of said McClintock; the second paragraph differs only in alleging that appellee agreed to become surety for said Peugh, if said Charles McClintock, *or some other person equally as reliable, financially*, would become a co-surety with him, and alleging the knowledge of appellant as in the first paragraph.

There is no merit in appellant's contention that the answers are bad because not sworn to in absolute terms. A statement sworn to upon the belief of the

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affiant is equivalent to one sworn to in absolute terms. *Simpkins v. Malatt*, 9 Ind. 543; *Bonsell v. Bonsell*, 41 Ind. 476.

Measured by the rules of law, as above stated, we are of the opinion that both paragraphs of appellees' answer were sufficient, and that the court below was right in overruling the demurrers. Appellant's counsel, in their brief filed herein, argue none of the causes assigned in the motion for a new trial, except that the judgment is not sustained by sufficient evidence. We have carefully read all the evidence in this cause, and not only think that there was evidence tending to prove every material allegation of appellee's answer, but are of the opinion that the evidence justified the finding of the lower court. It is needless to cite authorities upon the oft repeated rule of this court, that the judgment of the lower court will not be disturbed where there is any evidence to sustain it.

Judgment affirmed.

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[No. 1,992. Filed April 20, 1897.]

INTOXICATING LIQUORS.—*License Not a Contract.*—A license to engage in the liquor traffic is not a contract, but a mere permit, and the applicant who receives it does so with the knowledge that it is at all times within the control of the legislature. *p. 413.*

SAME.—*Location and Arrangement of Room Where Liquors are Sold.*—*Where License Was Issued Prior to the Taking Effect of the Law.*—

Section 4, of the act of March 11, 1895, requiring the room where liquors are sold to be located on a ground floor and so arranged that the interior may be seen from the street, and forbidding the obstruction of the view of the interior of the room during hours and days when the sales of liquor are prohibited, is valid as to persons doing business under licenses issued prior to the taking effect of the act. *p. 413.*

SAME.—*Duties of Peace Officer in Enforcing the Law.*—The fact that

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section 7, of the act of March 11, 1895, makes it the duty of peace officers to enforce the provisions of the act in all towns and cities in which a saloon may hereafter be located does not excuse such officers from enforcing the law as to saloons in existence at the time of its taking effect. *p. 414.*

SAME.—*Violation of a Statute May be Without Violating Every Provision.—Statute Construed.*—Under the general provision, in section 4, act of March 11, 1895, “For a violation of this or either of the foregoing sections of this act, the defendant shall be fined,” etc., it is not necessary that all the provisions of a section be violated in order to make one liable to a fine. *p. 414.*

SAME.—*Obstruction of View of Interior of Saloon on Fourth of July.—Statutory Construction.*—The obstruction of the view of a saloon on July 4, is an indictable offense, under section 4, act of March 11, 1895 (Acts 1895, p. 248), prohibiting the use of screens during those days and hours when sales are “prohibited by law,” and under section 2194, Burns’ R. S. 1894, providing that whoever shall sell, to be drank as a beverage, any intoxicating liquor upon the fourth of July, shall be “fined.” *pp. 414-416.*

SAME.—*Partial Obstruction of View of Interior of Saloon.—Statute Construed.*—Under section 4, of the act of March 11, 1895, providing that the room where liquors are to be sold be so arranged that the whole of said room may be in view of the street or highway, and that no blinds, screens or obstructions to the view shall be arranged or placed so as to prevent the “entire view of such room from the street,” the obstruction of any material part of the room is a violation of the act. *pp. 416, 417.*

From the Lake Circuit Court. *Affirmed.*

Johannes Kopelke, for appellant.

W. A. Ketcham, Attorney-General, and *Merrill Moores*, for State.

COMSTOCK, C. J.—Appellant was indicted for a violation of the act of 1895 in relation to the sale of intoxicating liquors. Acts 1895, page 248.

The indictment charges, in substance, that Charles Nelson, on the 4th day of July, 1896, at Lake county, Indiana, being then and there the owner and proprietor of a room having glass windows and doors, situ-

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ated on the south half of lot 14, on Main street, in Hobart of said county, in which room intoxicating liquors were sold by him under a license theretofore issued to him under the laws of the State of Indiana, for the sale of liquors in less quantities than a quart at a time, with permission to drink the same on the premises where sold, "did then and there unlawfully arrange, erect, permit and place screens, curtains, glass and other obstructions to the entire view of said room over, across, upon and in front of said windows and doors of said room, then and there opening into and fronting upon a certain street and highway, then and there situated, upon which said room was then and there situated, and did then and there and thereby unlawfully prevent the entire view of the interior of said room from said street and highway upon which said room was then and there situated, said day being the 4th day of July, and a day upon which the sale of intoxicating liquors was prohibited by law."

Appellant's motions to quash the indictment, and in arrest of judgment, on the ground that the facts stated in the indictment did not constitute a public offense, were overruled. Exceptions were taken.

The overruling of these motions are the errors assigned. They present the question of the sufficiency of the indictment. Appellant's "first objection to the indictment is that it fails to charge that appellant was operating under a liquor license issued to him since the 'Nicholson Law' went into effect," claiming that the portion of the law applying to this case does not affect persons who obtained license to sell liquor before it went into effect, which was not till the 28th day of June, 1895, according to the Governor's proclamation. Citing Suth. St. Const. 464-468; Endlich Interp. St., 271; Potter Dwar. St., p 163 (note); Cooley Const. Lim. (2d ed.), p. 370, to the effect that retrospective

laws are not looked upon with favor; that where the intention as to being retrospective is doubtful, the statute will be construed as prospective only; that it should not receive such construction as to make it impair existing rights, create new obligations or impose new duties, unless such plainly appear to be the intention of the legislature; in the absence of such plain design it should be construed as prospective only.

We think this question is decided adversely to the appellant in *State v. Gerhardt*, 145 Ind. 439, in which opinion the court says: "It may be said that when he [licensee] accepted the license, under the statute, and embarked in the sale of intoxicating liquors thereunder, he must be deemed to have consented to all proper conditions and restrictions which had been imposed by the legislature, or which might in the future be imposed in the interest of the public morals and safety, relative to the traffic in such liquors, or to the place wherein he was granted a permit to sell the same, notwithstanding their burdensome character. *Decker v. Sargeant*, 125 Ind. 404; *Black on Intox. Liq.*, section 50.

"A license to engage in the liquor traffic is not a contract or grant, but a mere permit, and the applicant who receives it does so with the knowledge that it is at all times within the control of the legislature. *McKinney v. Town of Salem*, 77 Ind. 213; *State, ex rel. v. Bonnell*, 119 Ind. 494; *Moore v. City of Indianapolis*, 120 Ind. 483; *Black on Intox. Liq.*, section 51."

We do not question the correctness of the proposition of law asserted by appellant's learned counsel, but we do not deem this provision retroactive. It is intended to regulate the manner of conducting a business which it is conceded the legislature possesses the right to regulate. It provides that certain restric-

tions and conditions shall apply to all who are licensed to engage in this business, whether they are licensed before or after the enactment of the law. It applies only to the conduct of the business after it takes effect. Appellant contends that if section 4, upon which this prosecution is based, is made to apply to those who, before its enactment, had been authorized to engage in the business, the imposition and wrong of driving them out of the business in many cases would result; that they may be located on a higher floor, or in a room not fronting on a street or highway, or in one that cannot be in view from the street, or they may be tenants who have no control over the arrangement of the room, nor any right to remove painted windows or other obstructions to the view.

Granted that this condition may exist, and applying the law in such instances, would result in inconvenience and expense, yet those accepting licenses must be presumed to do so with knowledge of the power of the legislature to impose additional restrictions upon those to whom they grant a permit.

The fact that section 7 makes it the duty of all peace officers to enforce the provisions of the act in all towns and cities in which a saloon may hereafter be located, does not excuse the officer from enforcing the law and its reasonable regulations as to saloons in existence at the time of its taking effect. Appellant questions the sufficiency of the indictment upon the further ground that it does not charge a violation of all of section 4, contending that the language, "violations of this or either of the foregoing sections," means the sections in their entirety. That section 4, above quoted, makes the provision for the place where a saloon may be located, and its arrangement with reference to the view of the street or highway; that the

section is violated only when a person fails to comply with it in both regards. And in the case at bar it is attempted to charge a violation of the second part, by maintaining screens and other obstructions to the view.

Under the decision in *State v. Gerhardt, supra*, the question is not open to discussion. "The violation of a section of this act may be, in part or as a whole, and in either case the penalty provided in section four is prescribed."

Appellant contends that in section 4, prohibiting the placing of screens during such days and hours when the sales of such liquors are prohibited by law, that the word "prohibited" means "to forbid by authority, to interdict, to hinder, to debar, to prevent, to preclude, and that when applied to the sale of liquors it means more especially to forbid it altogether, to enjoin it absolutely, and that in this sense the law does not prohibit the sale of intoxicating liquor in the State of Indiana on the 4th day of July." In support of this proposition, counsel contend that only two statutes of our criminal code touch the subject, namely, section 2195, Burns' R. S. 1894 (2099, R. S. 1881), which says that "It shall be unlawful for any druggist or druggist's clerk to sell, barter, or give away any spirituous, vinous, malt or other intoxicating liquor on Sunday; or upon the fourth day of July," etc., and section 2194, Burns' R. S. 1894 (2098, R. S. 1881), which reads: "Whoever shall sell, barter, or give away, to be drunk as a beverage, any * * * intoxicating liquor, upon Sunday, the fourth day of July, * * * shall be fined." And insisting that the act is not forbidden, only a penalty declared against it; that the inhibition is not general, not in all cases nor for all purposes; that it interdicts sales only when it is to be drunk as a beverage, and permits it

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for medicinal, scientific, etc., purposes, except only "to be drunk as a beverage;" that the law under discussion does not say "liquor dealers shall not maintain screens in their places of business at times when liquors may not lawfully be sold as a beverage, but during such days when sales are prohibited by law;" that it must mean "at hours and seasons when sales are forbidden always, everywhere, to all," and that is the meaning of the word "prohibited;" and that the 4th day of July not being one upon which the sale of liquor is prohibited by law, the indictment charges no offense, and the court erred in overruling the motions to quash, and in arrest of judgment. We cannot concur in this proposition. The statute, without in terms forbidding the sale, provides a penalty. It is the penalty which is effective in the enforcement of laws. The enactment of the penalty is equivalent to forbidding the act, and while this may not "prohibit" in the sense of preventing all sales, it provides for the punishment of such as may be made contrary to the statute. See *Heddrich v. State*, 101 Ind. 564, 51 Am. Rep. 768.

Another error assigned is the overruling of the motion for a new trial. The motion for a new trial was on the ground that the court erred in giving each instruction given, and that the verdict was contrary to the law and to the evidence.

The evidence shows that the defendant (appellant) kept a saloon in Hobart; that on the 4th day of July, 1895, he had screens and curtains at the door of his saloon, and blinds, curtains and pictures in the windows towards the street, preventing and obstructing the view into the saloon.

Hans Hanson testified that on the 4th day of July, 1895, the saloon was arranged with curtains extending about six feet from the sidewalk (the floor), and that pictures were below the glass and the curtains.

He testified that he could not see in between the pictures and the wall or the door on either side. The defendant testified that the view of the interior of the room was not materially obstructed. There is evidence to sustain the verdict, and this court, under the rule, cannot reverse the judgment on the evidence.

The only instruction discussed reads as follows: "It is not necessary in this cause to show that the view of the whole room was obstructed, as under the statute it is unlawful in that manner to obstruct the view of any part of the room where intoxicating liquors are so sold. So, I instruct you, so far as this branch of the case is concerned, that if the defendant obstructed the view of any material part of the room in which the liquor was so sold, that this is prohibited by law. It is not necessary to show that the obstruction consisted in the maintaining or in having or arranging all of these different methods of obstruction that are mentioned in this indictment. If he obstructed the view in the manner I have explained to you by means of any of these things that are mentioned in the indictment, there would be a violation of the law, so far as this branch of the case is concerned."

Appellant bases his claim of error upon the interpretation given by the court to the language of the statute, "the entire view," and that in giving it, the court went far beyond the letter of the law. We understand the position of the learned counsel for appellant to be that the provision is not violated unless a view of the room is wholly obstructed; in other words, if a view is given of a part of the room, the statute is not violated. We believe that this interpretation of the statute is inconsistent with the evident aims of the legislature and the object it sought to accomplish. One purpose of the law is to prevent the

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sale of liquor on certain days; to render the observation of sales on such days easy, dealers are forbidden to interpose any obstruction between the street and the interior of the room, which might prevent or render difficult for one on the street or highway on which the saloon fronts seeing what occurred inside. This purpose would not be accomplished if a part is screened in which a sale might be made.

The language of the statute is: "And said room shall be so arranged, either with window or glass door, as that the whole of said room may be in view from the street or highway, and no blinds, screens or obstructions to the view shall be arranged, erected or placed so as to prevent the entire view of said room from the street," etc.

It is, we think, clear from all the language used that the legislature intended that no material part of the room fronting the highway in which sales might be made should be hidden, by means named in the statute, from the view of persons passing in front thereof.

We think the instruction fairly stated the law of that branch of the case, and that there is no error in the record.

Judgment affirmed.

WILEY, J., took no part.

SARGENT ET AL. v. ROBERTSON.

[No. 2,143. Filed April 20, 1897.]

CONTRACT.—*Consideration.*—A promise to do what the promisor is under a previous valid, legal obligation to do, is insufficient as a consideration for an agreement of which it constitutes a part. *p. 421.*

SAME.—*Executory.*—*Maybe Abandoned by Agreement of all the Parties.*—A contract which is wholly executory may be abandoned by the agreement of all the parties, the renunciation of each party of his

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rights under the contract being a sufficient consideration for his release from obligation by the other parties. *pp.* 421, 422.

LANDLORD AND TENANT.—*Oral Modification of Lease.—Consideration.*

—An oral modification of a lease of certain real estate for coal mining purposes, providing for the payment of a smaller royalty, the lessor agreeing to the change in order to induce the lessee to remain in possession and operate the mine, is supported by a sufficient consideration where it is shown that the lease, as modified, was acted upon and carried out to the acceptance of all concerned for many years. *pp.* 421-428.

From the Warrick Circuit Court. *Affirmed.*

W. Reister, I. Taylor, W. Taylor and L. Taylor, for appellants.

S. B. Hatfield, J. A. Hemenway, F. H. Hatfield and A. J. Rutledge, for appellee.

BLACK, J.—The complaint of the appellants against the appellee contained two paragraphs. In both, it was shown that on the 12th of January, 1881, one O. P. Sargent being the owner in fee simple of certain lands in Warrick county, he and the appellee executed a written agreement, which was made an exhibit, whereby said Sargent demised and let said lands to the appellee for the sole purpose of mining and removing therefrom the coal lying below the surface, in consideration whereof, the appellee covenanted and agreed to enter upon said lands, sink a shaft to the bed of the coal, and have the same completed and ready for operation within twelve months from the date of the lease, and from thence to dig and mine the coal, and to pay said Sargent for all salable coal at the rate of forty cents per hundred bushels of eighty pounds per bushel; payment to be made monthly. It was provided that if the appellee failed to comply with the above stipulations, the lease should be null and void. By the terms of the lease the appellee reserved the right to all slack coal for

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fuel for the engine, and said Sargent reserved the right, at all reasonable hours, to inspect the appellee's mining book, and the right to enter and survey the mine. The appellee further reserved the right to remove all buildings, fixtures and machinery from said lands whenever the same were worked out. It was also stipulated that, "if the works shall be shut down for ninety days," the lease should be null and void.

It was alleged in both paragraphs that in April, 1886, said lessor died intestate, seized of the reversion of said premises; and the appellants were shown to be heirs of the lessor, and also purchasers from his other heirs.

In the first paragraph it was alleged that the lessor and all the parties seized of the reversion performed all the conditions on their part; that the appellee, from the 31st of November, 1886, to March 31st, 1895, mined a specified number of bushels of salable coal; that during that period he paid a certain sum, leaving a balance designated due and unpaid, as shown by a bill of particulars filed with the complaint.

In the second paragraph it was alleged that the appellee, upon the execution of the lease, entered said premises under it and failed to pay the installment of rent coming due on the 11th day of May, 1895. A formal demand, before sunset, and a refusal were averred; and it was alleged that the rent still remained due and unpaid; and that the appellee unlawfully held over, etc.

The complaint demanded judgment for possession and damages, and also for the balance of rent unpaid.

Issues were formed and tried, and the appellants here assign as errors the overruling of their demurrers to the third and fourth paragraphs of the appellee's answer.

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We do not find in the record any demurrer to the fourth paragraph of answer. In the third paragraph it was alleged, in substance, that after the execution of the lease, and during the lifetime of the lessor, he was informed by the appellee that he could not pay the price or royalty provided for in the lease, and would have to forfeit the same by shutting down the mine for a period of ninety days, and thereby rendering the lease void; that he could not compete with other men engaged in mining coal in and about the place where the mine was situated, and pay forty cents per hundred bushels of eighty pounds per bushel, because of the extra difficulty in mining and excavating coal under said land; that unless he could get said coal for less royalty, he would be forced to shut down said mine for ninety days and make void said lease, and then remove his buildings, shaft and fixtures; when it was then agreed by and between the appellee and said O. P. Sargent, in order to prevent a forfeiture of said lease, and keep said mine running, and to secure to said Sargent a royalty from said mine, and allow appellee to mine said coal, that the rent or royalty should be changed from forty cents to twenty-cents per hundred bushels at eighty pounds per bushel; that pursuant to said agreement said O. P. Sargent accepted from appellee twenty-five cents per hundred bushels royalty for all coal mined under said lease, and appellee paid the same in full; that long after the death of said O. P. Sargent, the administrator of his estate, in a proceeding in the court below, by order of the court, made a full settlement with appellee, and appellee paid him twenty-five cents per hundred bushels in full satisfaction of all said claim for royalty; that under said new contract said mine was operated under said lease at said reduced rate up to the time of the filing of the complaint herein, and

said royalty of twenty-five cents per hundred bushels was fully paid to the heirs of said O. P. Sargent, the appellants, at said rate, up to the time of bringing this suit, which appellants accepted in full settlement of their said claim.

It is contended by the appellants that the new contract upon which the appellee based his defense in the third paragraph of answer was an agreement without consideration, and that, therefore, this answer was insufficient.

It is a familiar rule, that a promise to do what the promisor is under a previous valid, legal obligation to do, is sufficient as a consideration for an agreement of which it constitutes a part. *Ford v. Garner*, 15 Ind. 298; *Reynolds v. Nugent*, 25 Ind. 328; *Smith v. Tyler*, 51 Ind. 512.

A contract which is wholly executory may be discharged and abandoned by the agreement of all the parties; the renunciation by each party of his rights under the contract being a sufficient consideration for his release from obligation by the other parties.

It is, in effect, contended on behalf of the appellants that, while this is true, yet when the contract has been acted upon, and in part performed, the obligations of the parties cannot be discharged by agreement without a new consideration, and that in the case before us a sufficient consideration for the new arrangement does not appear.

It is not expressly stated in the third paragraph of answer that the new agreement was made after work had been commenced under the written agreement, but the pleading is treated by counsel as proceeding upon such theory; and it contains averments consistent therewith, and is subject to such construction upon demurrer.

By the terms of the new arrangement no change

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was made whereby Sargent was to do or give anything other than was required of him under the written lease; and the only change made was that the appellee should pay twenty-five cents instead of forty cents per hundred bushels of coal of eighty pounds per bushel.

Did the facts shown in the answer furnish sufficient consideration for the new agreement?

In *Monroc v. Perkins*, 9 Pick. (Mass.) 298, 20 Am. Dec. 475, the plaintiff had been employed by the defendants by contract under seal for the erection of a hotel, for a certain sum. The action was *indebitatus assumpsit* for work done, materials furnished, etc. The defense was that the work was done and the materials were furnished on the special contract under seal, which was produced in evidence. The plaintiff was permitted to introduce evidence that, after he had partly finished the work, he expressed regrets at having undertaken it, and was assured by the defendants that he should not suffer, and that the work was carried on and finished upon their engagement and promise that he should have reasonable compensation, without regard to the special contract. It was held that this parol evidence was admissible to show waiver of the sealed contract. It being contended that the parol promise was without consideration, the court said: "This depends entirely on the question whether the first contract was waived. The plaintiff having refused to perform that contract, as he might do, subjecting himself to such damages as the other parties might show they were entitled to recover, he afterward went on upon the faith of the new promise and finished the work. This was a sufficient consideration. If Payne and Perkins were willing to accept his relinquishment of the old contract and proceed on

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a new agreement, the law, we think, would not prevent it."

In *Lattimore v. Harsen*, 14 Johns. 330, the plaintiffs had entered into an agreement with the defendant, under seal, to perform certain work for a stipulated sum, under a penalty. After some part of the work was done, the plaintiffs became dissatisfied with the agreement and determined to abandon the work, when the defendant agreed that if the plaintiffs would go on and complete the work he would pay them by the day for their labor and materials found, without reference to the written contract. It was held that if the plaintiffs chose to incur the penalty for nonfulfillment of the special contract, they had a right to do so, and notice of such intention having been given to the defendant, upon which he entered into the new agreement, there was a sufficient consideration for his promise, and the plaintiff might recover under the substituted agreement.

In *Bishop v. Busse*, 69 Ill. 403, there was a contract, not under seal, for the building of a house by the plaintiffs for the defendant, at certain prices specified. After the work had been commenced, the plaintiffs informed the defendant that they could not and would not go on under the contract, and must abandon it; when the defendant told the plaintiffs to go on and finish the job, and he would pay them what was right for it. It was held that the new contract had a sufficient consideration. The court said, that upon the failure of the plaintiffs to perform the contract the defendant could have recovered damages occasioned by the breach; but that he may have considered this of less advantage to him than the completion of the building, and if so, that of itself would have been a sufficient consideration to support the new agreement.

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In *Raymond v. Krauskopf*, 87 Ia. 602, 54 N. W. 432, the plaintiff, in April, leased to the defendant a farm of forty acres for a year; the lease being in writing and requiring the defendant to deliver in November, sixteen bushels of corn per acre. In June, storms injured the growing corn, and the defendant informed the plaintiff that there would not be enough corn raised to pay the rent, and that he would not farm the land unless a new arrangement were made; and he proposed to surrender the land and obtain employment by the month; whereupon the plaintiff told the defendant to farm the land, and the plaintiff would accept one-half of the corn raised in full of all demands for the rent. The defendant then replanted the corn, farmed the land during the season, and delivered to plaintiff 200 bushels of corn, retaining only 150 bushels himself. The action was to recover the value of the 480 bushels of corn required to make up the quantity provided for in the written lease. It was held that there was a sufficient consideration to support the second agreement.

Ten Eyck v. Sleeper (Minn.), 67 N. W. 1026, was an action upon a written lease of a hotel, to recover rent as stipulated in the lease, which by its terms ran for ten years from 1890, at a monthly rental of \$500.00, the lessee to keep the premises in repair. The lessee took possession under the lease. In 1893, the tenant complained to the landlord of the depression in business, and declared that he was unable to pay the rent as agreed; and soon thereafter, being insolvent and unable to pay rent as agreed, he refused to pay further rental, and refused to continue to occupy the premises under the lease, and notified the landlord that he would pay no more rent under or according to its terms and would vacate the premises. Thereupon, the parties executed an agreement, writ-

ten on the back of the lease, whereby it was agreed that the rent should be reduced to \$350.00 per month until 1897, and that the landlord should make certain repairs. The tenant continued to occupy the premises as before, and paid rent under the modified lease, for which receipts in full were given, for sixteen months, when he became insolvent and unable to carry on the hotel. It was held that the modification rested on a sufficient consideration. See, also, *Cooke v. Murphy*, 70 Ill. 96; *Jaffray & Co. v. Greenbaum*, 64 Ia. 492, 20 N. W. 775; *Stewart v. Keteltas*, 36 N. Y. 388; *Conkling v. Tuttle*, 52 Mich. 630, 18 N. W. 392; *Holmes v. Doane*, 9 Cush. 135; *Rollins v. Marsh*, 128 Mass. 116.

The doctrine of these cases has been applied in this State. In *Mills v. Riley*, 7 Ind. 137, a special contract for work and labor had been in part performed, when it was abandoned by mutual consent of the parties, and work in continuation of that already done under the contract was afterward performed, under a new arrangement. It was held that the original contract did not govern in limiting the price and designating the article in which payment was to be made.

In *Coyner v. Lynde*, 10 Ind. 282, it was held, that when a contract for work is abandoned by one of the parties, the other party has his election whether to sue for nonperformance, or to obtain the completion of the work by a new arrangement; and that if in making such new arrangement or agreement, new or additional promises be made by him to the other party dependent upon the completion of the work, and the latter, in consideration of such new promises, completes the work, such new promises should be held binding.

In that case the plaintiff was a contractor for the construction of a portion of a railroad. The defend-

ants agreed with the plaintiff to complete a portion of the latter's contract, for which the defendants were to receive from the railroad company the same rates that the plaintiff was to receive, and the defendants were to pay the plaintiff a certain portion of the sum so received. The suit was to recover that sum. An answer was held sufficient which alleged that after the parties had entered into the agreement sued on, it was ascertained that the prices at which the plaintiff had undertaken with the company to do the work were greatly inadequate; that it would be a losing business to prosecute the work; that upon such discovery, the defendants determined to abandon the contract and to leave the plaintiff to perform it; that he, knowing he would suffer loss to complete it himself at the prices, in view of such facts, and to induce the defendants to go on with the work and not throw it on his hands, agreed that if the defendants would continue the work to completion, and procure additional pay from the company, which, with the amount agreed to be paid to the plaintiff, would enable them to complete the work and save him from prosecuting it, the plaintiff would release the defendants from said payment; and that relying on this promise and an agreement of the company to pay them an additional compensation, they completed the work.

In the written contract involved in the case at bar, the provision relating to the shutting down of the works for ninety days is to be regarded as having been inserted for the benefit of the landowner, Sargent, and it did not rest with the appellee alone to terminate all obligation on his part under the contract by so ceasing, without the consent of the other party, the work which, by other portions of the instrument, he was required to prosecute.

It was not provided in the contract that it should

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be optional with the appellee to cease operations and remove the buildings, fixtures and machinery at any time when he might be pleased to do so before the land should be worked out. And yet it was within the power of the appellee by actually ceasing operations, to cause the mine to lie unworked, to compel the landowner to work himself, or to drive him to seek a contract with some third person.

When the appellee informed O. P. Sargent of the inability of the former to perform the contract at the price per hundred bushels of coal therein agreed upon, and stated his reasons therefore, and told said Sargent that the appellee would be forced to shut down the mine, as alleged in the answer, said Sargent thus had presented to him a choice between reliance upon his right to treat the contract as renounced by the appellee, so far as future mining was concerned, and to pursue the recovery of such damages as he may have supposed would be awarded in an action for breach of the contract, on the one hand, and, on the other hand, his acceptance of the alternative proposed by the appellee. He may have regarded the amount recoverable at law as uncertain, and the prospect of actual benefit through resort to legal proceedings as doubtful or hopeless, and he may have considered the arrangement proposed as more beneficial than any other that he could make for the working of the mine. He appears to have chosen to make the new arrangement, whereby he secured the continuance of mining operations by the appellee.

Whatever the true technical character of the contractual relations of the parties, we are here dealing with a particular dispute as to their rights arising from their acts under those relations.

Upon the proof of the facts alleged in the answer, they might be regarded as sufficient to sustain a con-

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clusion that the old contract was rescinded by mutual agreement, and, it having been thus abandoned, that the modified contract was substituted in its place.

The new arrangement did not end with the making of the oral modification, but the new arrangement was acted upon and carried out to the acceptance of all concerned for many years, and up to the institution of this action. In the decided cases much stress is properly laid upon such carrying into effect of the new contract by the subsequent conduct of the parties.

It would seem that it would be a reproach to the law if any of its rules were so inflexible that in their application the courts could not find a way to refuse to lend their aid to such an inequitable demand as that of the appellants is shown to be by the answer under review.

The judgment is affirmed.

BAKER v. BORN.

[No. 2,197. Filed April 21, 1897.]

BAILMENTS.—*Grain Deposited With Warehouseman.*—Where a warehouseman receives grain on deposit from the owner, to be mingled with other grain in a common receptacle from which sales are made, the warehouseman keeping at all times sufficient grain of like kind and quality for the depositor, and ready for delivery to him upon demand, the contract is one of bailment. *p. 402.*

CONVERSION.—*Plaintiff Must be the Owner or Entitled to Possession.*—A person cannot maintain an action for conversion where he neither owns nor is entitled to possession of the property alleged to be converted. *p. 403.*

SAME.—*Sufficiency of Complaint in Action Against Warehouseman.*—In an action against a warehouseman for the conversion of certain corn deposited with him, the complaint should allege that prior to the commencement of the action defendant did not have a sufficient quantity of corn of the kind and quality deposited with him with which to meet a demand by plaintiff; that a demand was made;

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that storage charges and expenses were tendered, or that storage charges had not attached. pp. 404, 405.

SAME.—*Complaint in Action Against Warehouseman.*—An allegation in a complaint in an action against a warehouseman for conversion of a quantity of corn deposited with him, that on and before a specified date defendant had no corn in his warehouse or under his control, of the quality of plaintiff's corn deposited prior to a specified earlier date, but had sold such corn, is not equivalent to an allegation that on a day certain the defendant did not have in his warehouse sufficient corn of the kind and quality deposited by plaintiff. p. 405.

From the Tippecanoe Superior Court. *Affirmed.*

J. M. La Rue, W. C. Mitchell and Thompson & Storms, for appellant.

Caldwell & Caldwell, for appellee.

HENLEY, J.—The complaint in this case is short, and probably states the facts in as brief a form as could be done by the court, and is as follows:

“The plaintiff, Helen C. Baker, complains of Samuel Born, defendant, and says, that during the years 1892, 1893, and 1894, said defendant was a warehouseman, doing business in the city of Lafayette, in said county and State, and during said years this plaintiff, then Helen C. Pickering, stored in said defendant's warehouse 863 bushels and 6 pounds of corn, 525 bushels and 60 pounds in 1892 and 1893, the last being deposited July 18, 1893, and 337 bushels and 14 pounds in 1894, the last delivery being April 24, 1894; that the corn deposited in 1892 and 1893 was sold by said defendant without any notice to this plaintiff, a short time after it was deposited in said warehouse, the exact time of said sale being unknown to this plaintiff, but she charges within three months of the time when deposited, and the corn deposited in 1894 was also sold by said defendant without notice to plaintiff, within three months of the time when it was de-

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posited, and in both cases the proceeds of said corn were converted by defendant to his own use as soon as sold; that on or before the 1st day of November, 1893, said defendant had no corn in his warehouse of the quality of plaintiff's corn or under his control, deposited prior to August 1, 1893; that on or before October 10, 1894, he had no corn in his warehouse of the quality of plaintiff's corn deposited prior to July 1, 1894, but in both instances had sold all such corn; that said corn at the time the same was sold was worth 40 cents a bushel; that afterwards and before the bringing of this suit, said defendant denied having any of plaintiff's corn in store, and refused to pay her anything for said corn; that the value of said corn at 40 cents per bushel, with interest thereon from the date of its conversion, is due and unpaid. Wherefore, plaintiff brings suit and demands judgment for the value of said corn and interest thereon from date of sales thereof, being altogether \$500.00, and for all other just relief."

At the same time appellant, who was the plaintiff below, filed interrogatories to be answered by appellee under oath. Appellee moved to strike out all the interrogatories submitted, which motion was, by the court, sustained, except as to the interrogatories therein numbered one and two. To this ruling of the court appellant excepted. Appellee demurred to the complaint, stating as a reason, that the same did not state facts sufficient to constitute a cause of action. The demurrer to the complaint was sustained, to which ruling appellant excepted, and the appellant declining to plead further, judgment was rendered in favor of appellee.

The errors assigned are, (1) that the court below erred in sustaining appellee's demurrer to appellant's complaint; (2) that the court below erred in sustaining

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appellee's motion to strike out the interrogatories filed with appellant's amended complaint.

It appears, from the complaint, that appellee was conducting a warehouse where grain was received and stored, and from which he made sales; that appellant stored corn with appellee in the ordinary course of the business, with no special contract that the corn was to be treated in any manner different from that of other depositors.

It is the law in this State, that where a warehouseman receives grain on deposit from the owner, to be mingled with other grain in a common receptacle from which sales are made, the warehouseman keeping at all times sufficient grain of like kind and quality for the depositor, and ready for delivery to him upon demand, the contract is one of bailment. *Woodward v. Semans*, 125 Ind. 330; *Rice v. Nixon*, 97 Ind. 97; *Bottenberg v. Nixon*, 97 Ind. 106; *Lyon v. Lenon*, 106 Ind. 567; *Morningstar v. Cunningham*, 110 Ind. 328.

The contract entered into between the parties to this action was, then, a contract of bailment, and not of sale.

An action for conversion could not have been maintained, on the other hand, if the facts alleged made the contract one of sale, because, then the ownership and possession of the corn would have been in appellee, and where a person neither owns nor is entitled to the possession of the property alleged to be converted, he cannot maintain the action. *Hamilton, Exr., v. Toner, ante*, 389; *Hunter v. Cronkhite*, 9 Ind. App. 470.

The duty owing from appellee to appellant was the delivery to her upon demand, and upon her paying any agreed storage charges, corn of the same kind and quality as he had received from her. This rule is rendered necessary in matters of this kind in order to

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carry on the business of handling the great grain crops of this country, for to preserve intact at a public warehouse the individual deposits of grain would be well nigh impossible.

Thus, it was said by Elliott, J., in the case of *Rice v. Nixon, supra*, "It is not unknown to us, nor can it be unknown to any court, for it is a matter of great public notoriety and concern, that a vast part of the grain business of the country is conducted through the medium of elevators and warehouses, and it cannot be presumed that warehousemen in receiving grain for storage, or depositors in intrusting it to them for that purpose, intended or expected that each lot, whether of many thousand bushels, or of a few hundred, should be placed in separate receptacles; on the contrary, the course of business in this great branch of commerce, made known to us as a matter of public knowledge and by the decisions of the courts of the land, leads to the presumption that both the warehouseman and the depositor intended that the grain should be placed in a common receptacle and treated as common property. This rule secures to the depositor all that in justice he can ask, namely, that his grain shall be ready for him in kind and quantity whenever he demands it. Any other rule would impede the free course of commerce and render it practically impossible to handle our immense crops. It is reasonable to presume that the warehouseman and his depositor did not intend that the course of business should be interrupted, and that they did not intend that the almost impossible thing of keeping each lot, small or great, apart from the common mass should be done by the warehouseman. If the warehouseman is not bound to place grain in a separate place for each depositor, then, the fact that he puts it in a common receptacle with grain of his own

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and that of other depositors, does not make him a purchaser, and if he is not a purchaser, then he is a bailee. In all matters of contract the intention of the parties gives character and effect to the transaction, and in such a case as this the circumstances declare that the intention was to make a contract of bailment and not a contract of sale. The duties, rights and liabilities of warehousemen are prescribed by the law as declared by the courts and the legislature, and as matter of law it is known to us that a warehouseman, by placing grain received from a depositor in a common receptacle, and treating it as the usages of trade warrant, does not become the buyer of the grain, unless, indeed, there is some stipulation in the contract imposing that character upon him."

This complaint does not allege that at any time prior to the commencement of this action the appellee did not have a sufficient quantity of corn of the kind and quality deposited with him by appellant with which to meet a demand therefor. It does not allege that prior to the commencement of this action the appellant demanded a return of her corn deposited, nor that at any time prior to the filing of the complaint appellant tendered to the appellee any amount due appellee for storage and expenses, or aver that no storage charges or expenses had attached thereto; hence this cause does not fall within the doctrine announced by the Supreme Court in *Jordan v. Shireman*, 28 Ind. 136. This cause is further distinguished from the case of *Jordan v. Shireman*, *supra*, for the reason that, in the case last mentioned, the deposit was of a particular kind of wheat placed in a separate bin, which wheat was sold by the warehouseman without notice to the owner.

The allegation in the appellant's complaint, "that on and before the 1st day of November, 1893, said de-

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fendant had no corn in his warehouse of the quality of the plaintiff's corn, or under his control deposited prior to August 1, 1893; and on and before October 10, 1894, he had no corn in his warehouse of the quality of plaintiff's corn deposited prior to July 1, 1894, but in both instances had sold all such corn," is not equivalent to an allegation, if, in fact, such an allegation was material, that on a day certain the appellee did not have in his warehouse sufficient corn of the kind and quality deposited by appellant with him.

We do not understand that it is at all material when appellee purchased the grain with which to keep his stock intact as against the demand of his depositors, but that it was necessary for appellee to be able to deliver upon demand, to depositors with him, grain of amount, kind and quality, without regard to when or where he may have procured it.

We are convinced that the court below did not err in sustaining the demurrer to the complaint. After holding the complaint insufficient, it would be unnecessary for this court to pass upon the question as to whether or not the interrogatories were properly stricken out. There being no cause of action shown by the complaint against the appellee, the court has nothing by which to determine the pertinency of the interrogatories.

Judgment affirmed.

Caulfield v. Polk.

CAULFIELD v. POLK.

[No. 2,109. Filed April 21, 1897.]

MECHANIC'S LIEN.—*Contractor.*—*Sub-materialman.*—A corporation which does not manufacture boilers, but furnishes to mills and factories engines and boilers, using the engines of its own make, and boilers made by a third party, which agrees to furnish a manufacturer an engine and boiler delivered on board the cars, the purchaser to pay the freight charges, is a mere materialman and not a contractor within the meaning of section 7255, Burns' R. S. 1894, so as to give the party furnishing the boiler a materialman's lien. pp. 433, 434.

CONTRACTOR.—*Meaning of the Term.*—A contractor is one who agrees to do a piece of work for another on his own responsibility and credit. p. 435.

MECHANIC'S LIEN.—*Payment Before Filing of Notice.*—*Rights of Sub-materialman.*—Payment by the owner of real estate to one who had contracted to furnish certain machinery for a building, before the notice of mechanic's lien was filed, and within the time for filing, neither enlarges nor diminishes the right to a lien by a third party who furnished part of the machinery. pp. 433-437.

From the Marion Superior Court. *Affirmed.*

C. C. Binkley, and Carter & Brown, for appellant.

Herod & Herod, for appellee.

ROBINSON, J.—This was a proceeding by appellant to foreclose a mechanic's lien. Upon a special finding of the facts, the court stated its conclusions of law in appellee's favor. The court's conclusions of law upon the facts found, and overruling the motion for a new trial are the errors assigned.

The facts found are, substantially, that, on the 24th day of June, 1893, the appellee entered into a contract with the Eagle Machine Works, a corporation, by which the machine works agreed to sell and furnish to the appellee an engine and boiler for appellee's canning factory, located on certain real estate in

Greenwood, in Johnson county, Indiana; the engine and steam boiler to be delivered on board the cars at Indianapolis, and billed to appellee at Greenwood, appellee to pay the freight. Afterwards the appellant, a manufacturer of steam boilers at Richmond, Indiana, agreed to, and did, furnish to the Eagle Machine Works a steam boiler for the purpose of being used by it in fulfilling the contract with appellee. Pursuant to instructions of the machine works, the appellant, on the 19th day of July, 1893, shipped the boiler from Richmond, Indiana, to the machine works at Indianapolis, at which place it was received by, and the freight paid by the machine works. After adding a door to the boiler, the Eagle Machine Works, on the 22d day of July, 1893, shipped the boiler from Indianapolis to the appellee at Greenwood, by whom it was received a day or two after, and prior to the 1st day of August, 1893, was placed by the appellee in his factory at Greenwood. The engine was furnished appellee by the machine works prior to the 22d day of July, 1893, and was placed in the factory by appellee, having been set in brick and mortar and made a permanent addition to appellee's factory and the real estate on which the same was located. Appellee paid the freight on the boiler from Indianapolis to Greenwood. On the 4th day of August, 1893, appellant filed, and caused to be recorded in the recorder's office of Johnson county, a notice of his intention to hold a mechanic's lien on the real estate on which appellee's factory containing the boiler was located. On the 6th day of August, 1893, appellant gave appellee written notice of the filing of the notice of lien, which was received by appellee on the following day. Appellant has never been paid for the boiler. On the 27th day of July, 1893, appellee settled with the Eagle Machine Works for the engine and boiler by executing his note

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at ninety days, negotiable and payable in a bank in this State. On the 28th day of July, 1893, this note was transferred by the Eagle Machine Works to one Charles Latham as collateral on a large indebtedness owing by the machine works to him, Latham, at the time surrendering a like sum of the proceeds of other collaterals theretofore held by him against such indebtedness. Appellee paid the note to Latham at its maturity. On the 31st day of July, 1893, the machine works failed and was placed in the hands of a receiver, which receivership was still pending when this cause was tried. After the payment of appellee's note, Latham had collected from such collaterals a sum sufficient to discharge his debt and had paid to the receiver \$500.00 in cash, and that there was still uncollected collaterals of the face value of about \$400.00. The Eagle Machine Works did not manufacture boilers, but furnished to mills and factories engines and boilers, using the engines of its own make, but purchasing boilers from other parties. For more than a year prior to the 22d day of July, 1893, the machine works had been purchasing its boilers of the appellant, and it was the custom to settle on the 10th day of the month for all boilers purchased during the preceding month, either by cash or note not exceeding ninety days. In June, 1893, and prior to the 20th day of the month, the machine works had failed to meet its paper maturing during that month, and was asking appellant to renew its notes. On the 22d day of June, 1893, appellant informed the machine works that he could not sell it further goods unless he knew to whom the goods were to be furnished by the machine works, and unless he could have some security for payment of the same. On the last named date the machine works informed appellant that it was about to close a contract with appellee for machinery and that

in the contract was estimated one of appellant's boilers. Upon this information appellant stated to the machine works that he would look up appellee's commercial standing, which he afterwards did, and found the same satisfactory. Since June 26, 1893, the machine works ordered but two boilers from appellant, one of which was never shipped and the other was shipped to Indianapolis in the same car with the boiler for appellee's factory. On all sales of boilers made by appellant to the machine works prior to the 22d day of June, 1893, appellant had taken no mechanic's lien. After the 22d day of June, 1893, and prior to the time the machine works was placed in the hands of a receiver, appellant sold to it only two boilers, the one for appellee's factory and the other shipped by appellant in the same car, and for each of these appellant had taken a mechanic's lien, and each was taken and claimed within ten days after the appointment of the receiver.

Upon the facts found, the court stated as a conclusion of law that the appellant is not entitled to a mechanic's lien. Appellant's counsel contend that the court erred in its conclusion of law, and have directed their arguments to this point only.

Section 7255, Burns' R. S. 1894, provides: "That contractors, sub-contractors, mechanics, journeymen, laborers, and all persons performing labor or furnishing material or machinery for erecting, altering, repairing or removing any house, mill, manufactory or other building, bridge, reservoir, system of water-works, or other structure, may have a lien separately or jointly upon the house, mill, manufactory or other building, bridge, reservoir, system of water-works, or other structure which they may have erected, altered, repaired or removed, or for which they may have furnished material or machinery of any description and

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on the interests of the owner of the lot or land on which it stands, or with which it is connected, to the extent of the value of any labor done, or material or machinery furnished, or both.”

Appellant complied with the requirements of the statute as to giving notice, and the only question to be determined is whether the statute gives him a lien upon appellee's property for the value of the boiler.

The statute, in so far as it gives a right to a lien for machinery for the construction, repair or alteration of a mill or factory, has remained practically unchanged since the act of 1853, although the manner of acquiring the lien has been changed frequently. Section 5293, *et seq*, R. S. 1881; section 7255, Burns' R. S. 1894 (E. S. 1688).

The lien of a mechanic or materialman is not a common law right, but is a privilege conferred by statute. It does not create any additional right to the debt, but is an additional remedy for the collection of the debt. The remedy is cumulative, and may or may not be employed in connection with the ordinary action for the collection of the debt. It is no part of the original contract between the parties, and yet a contract, express or implied, must exist as a basis upon which the lien is fixed by complying with the statute. Its validity is derived only from positive legislative enactment, and a party claiming its benefits must show himself to be within the terms of the particular statute. The right to the lien rests upon the theory that the value of the property has been enhanced to the extent of the labor done or materials furnished.

The fact that appellee had, before the notice of the lien was filed, and within the time for filing, executed his note to the machine works for the price of the boiler, and that the note was a note payable in a bank

in this State, neither enlarges nor diminishes appellant's right to a lien. Whether that right exists must be determined regardless of whether appellee executed a bank note for the boiler or paid cash for it, or still owes for it. If the right to a lien exists, it attached when the boiler was furnished to the appellee, and if payment during the time allowed for filing the notice can defeat the lien, the statute would be inoperative and its very purpose defeated. *Indiana, etc., R. R. Co. v. Larrev*, 130 Ind. 368; *Clark v. Huey*, 12 Ind. App. 224.

In the able brief of counsel for appellant, it is argued that the machine works corporation was not a materialman, but that it occupied the position of a contractor; and that even if the corporation was a materialman, our statute is broad enough to confer on a sub-materialman the right to a lien on account of his having furnished a part of the materials or machinery.

Counsel cite the cases of *Colter v. Frese*, 45 Ind. 96; *Neely v. Searight*, 113 Ind. 316; *Clark v. Huey*, *supra*, and *Smith v. Newbaur*, 144 Ind. 95. But in all these cases materials were furnished to contractors or sub-contractors, to be by them placed in the building. It is well settled that if machinery is furnished for a factory to one who had authority to place such machinery in it, and the machinery is placed in the factory, the right to the lien exists whether the machinery was furnished to a contractor or a sub-contractor. *Smith v. Newbaur*, *supra*.

Was the machine works corporation a contractor within the meaning of that term as used in the lien law?

It is true, the finding says that the machine works contracted with appellee to furnish appellee an engine and boiler for his factory at Greenwood. In its primary meaning, the word contractor means one who

agrees to do anything for another; but if its meaning is thus restricted there would be no distinction between one who agrees to do a specific job of work without the supervision of another except as to the result, and one who agrees to do a work, but submits himself throughout the work to the discretion of his employer as to details. The courts of this State, in lien cases, have recognized the broader meaning of the term and have recognized a contractor as one who agrees to do a specific work for another upon his own responsibility and credit.

A statute giving to masons and carpenters a lien for their work and materials furnished by them for building and repairing houses was held not to extend to the owner of a mill who furnished lumber. *Pitts v. Bomar*, 33 Ga. 96.

So a lumberman was not included in a statute giving all artisans, builders and mechanics of any description a lien for "work and labor as well as for materials furnished by them in and about such work and labor." *Duncan v. Bateman*, 23 Ark. 327, 79 Am. Dec. 109.

An act which gives mechanics and artisans of every class a lien upon the articles manufactured or repaired by them for the value of their labor done thereon or materials furnished therefor, does not include materialmen. *Huck v. Gaylord*, 50 Tex. 578.

A person who agrees, in the alteration of a building, to furnish, deliver, and set in position certain mantels, tiles and grates and the appurtenances thereof is a materialman, and not an original contractor. *Bennett v. Davis*, 113 Cal. 337, 45 Pac. 684, 54 Am. St. 354.

A party who was to furnish the machinery and apparatus for an electric power house, and was to put in the foundation upon which to set the dynamos and furnish the skilled labor necessary for that, and the

further purpose of setting up and connecting the machinery, and installing the incandescent lamps, was held to be a materialman and not a contractor. *Roeb-ling's Sons Co. v. Humbolt, etc., Co.*, 112 Cal. 288, 44 Pac. 568. See, also, *Hinckley v. Field's Biscuit, etc., Co.*, 91 Cal. 136; *Wilson v. Hind*, 113 Cal. 357, 45 Pac. 695.

In *Farmers Loan and Trust Co. v. Canada, etc., R. W. Co.*, 127 Ind. 250, a sub-contractor is said to be one who takes from the principal contractor a specific part of the work. In that case it is said, "we do not believe that a laborer, working by the day, or a materialman who delivers ties or lumber, is a sub-contractor within the meaning of our lien law."

While our statute is broad in its terms, and has been liberally construed in favor of laborers and mechanics, and persons furnishing material and machinery for factories, yet its provisions are not broad enough to include machinery furnished as in this case.

The machine works stands in the same relation to the appellee that a materialman does to a contractor. The rights of appellant in this case are not different from what they would have been had appellee employed a contractor to alter and repair his factory by placing therein an engine and boiler to be furnished by the contractor, and the engine and boiler had been sold to such contractor by the machine works. The fact that the appellee, with his own employes placed the machinery in the factory cannot enlarge appellant's rights. Appellee's liability for the value of the boiler was in no way conditioned upon its being placed in his factory, but his liability attached, as between him and the machine works, as soon as the boiler had been placed on board the car at Indianapolis. In the case at bar, the machine works corporation simply sold a marketable commodity. When it

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placed the boiler on the car at Indianapolis its control over it ceased. No work was to be done under any contract, nor could the machine works control its final disposition. Under the facts found, if the boiler had been destroyed after it was placed on the car, it would have been the appellee's loss. Appellee could have placed the boiler in his factory at Greenwood or he could have sold it as soon as it was put on board the cars by the machine works. The appellee was bound by no contract with any one, the carrying out of which would enhance the value of his factory. The statute gave the machine works the right to a lien, not as a contractor, but as a materialman. The distinction between the two must be kept in view if property owners are to have proper protection. If one materialman, furnishing material to another materialman, has a right to a lien, then any materialman, no matter how far removed, has the same right, and all he has to do is to show that he furnished the material to be used in that particular building and it was so used. A materialman should be, and is, protected for any machinery furnished to a person authorized to put the same in a building, whether such person be the owner or a contractor or sub-contractor. Beyond this the statute does not go in terms, and should not go by implication.

In the case at bar, appellant did not furnish the boiler to appellee, nor to any one authorized to place it in appellee's factory, nor to any one authorized, either expressly or by implication, by appellee to purchase it.

The statute makes no provision for a lien in favor of one who simply sells materials to another who is himself but a materialman.

Judgment affirmed.

COMSTOCK, C. J., took no part in this decision.

COLE v. POWELL.

[No. 2,214. Filed April 22, 1897.]

SPECIAL VERDICT.—Assessment of Damages.—Statutes Construed.—Slander.—In an action for slander where a special verdict has been returned by the jury, under the act of March 11, 1895, it is proper for the jury to assess the damages in the alternative form based upon the facts found, as the said act of March 11, 1895, should be construed with section 557, Burns' R. S. 1894, which provides that, "In actions for the recovery of money the jury must assess the amount of recovery."

From the Howard Circuit Court. *Affirmed.*

Waugh, Kemp & Waugh, Fippen & Purvis and Moon & Wolf, for appellant.

R. B. Beauchamp, W. W. Mount, J. C. Blacklidge and C. C. Shirley, for appellee.

COMSTOCK, C. J.—Appellee, who was the plaintiff below, recovered judgment for five hundred dollars in an action for slander against appellant. The slanderous words imputed to appellant made a charge of forgery against appellee.

A special verdict was returned by the jury under the act of March 11, 1895 (Acts 1895, p. 248). Appellant and appellee each filed a motion for judgment on the special verdict. The court sustained appellee's motion and overruled appellant's motion; to which ruling appellant excepted. These rulings are assigned as the only errors.

Appellant insists that these rulings were erroneous "for the reason that the jury have nowhere found in the special verdict returned by them, in answer to an interrogatory propounded, the amount of damages

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sustained by appellee by the alleged utterance of the slanderous words charged in the complaint."

The jury found that the slanderous words imputed to the defendant were spoken by him maliciously; that they were false, and were known by the defendant to be false when he uttered them, and conclude with the usual formula, "If upon the foregoing facts the law is with the plaintiff we find for the plaintiff and assess his damages at the sum of five hundred dollars; if the law is with the defendant, we find for the defendant. J. T. Melton, Foreman."

Appellant contends that under the act of March 11, 1895; Acts 1895, p. 248 (section 546, Horner's R.S. 1896;) such formal conclusions have no legal place in a special verdict. Said section reads as follows: "That in all cases tried by the jury, the court shall, at the request of either party, in writing, made before the introduction of any evidence, direct such jury to return a special verdict upon any or all the issues of such case. Such special verdict shall be prepared by the counsel on either side of such cause and submitted to the court, and be subject to change and modifications of the court. The same shall be in the form of interrogatories so framed that the jury will be required to find one single fact in answering each of such interrogatories; the jury, on retiring, shall take all the pleadings in the case, including the instructions of the court, if in writing, and the interrogatories as approved by the court, and shall answer each of the interrogatories submitted to them."

It has been held, under this act, that the court submitting to the jury the interrogatories thus prepared may modify those prepared and frame additional interrogatories when necessary to elicit facts material to a proper finding of the facts in the case. *Hammond, etc.,*

R. W. Co. v. Spyzchalski, ante 7; *Bower v. Bower*, 146 Ind. 393.

Said section is an amendment of section 555 of Burns' R. S. of 1894. Under the section as amended, as well as by the terms of the original section, the jury were required to find specially, upon a proper request, the facts involved within the issues.

What under the old law would have been stated in narrative form, under the amended act should be given in answer to an interrogatory. The section in question should be construed in connection with section 557, Burns' R. S. 1894 (548, R. S. 1881), of the same act, reading as follows: "In actions for the recovery of money, the jury must assess the amount of the recovery."

"The assessment of damages has always been peculiarly within the province of a jury." *Wainright v. Burroughs*, 1 Ind. App. 393; *Thames, etc., Trust Co. v. Beville*, 100 Ind. 309; *Gaff v. Hutchinson*, 38 Ind. 341.

Under section 557 (548), *supra*, it has been uniformly held that even if there was no formal assessment of damages, yet if the facts found were sufficient to enable the court, by mathematical calculation, to determine the intention of the jury as to the amount of the recovery, judgment might be entered. *Plano Mfg. Co. v. Kesler*, 15 Ind. App. 110; *Johnson v. Bucklen*, 9 Ind. App. 154; *Hoppes v. Chapin*, 15 Ind. App 258.

In *Bransom v. Studabaker*, 133 Ind. 147, there was a special verdict, in which it seems there was no statement of a fact that plaintiff was damaged in a certain amount. The court, by Elliott, J., says: "We do not doubt the correctness of appellant's position that where damages only are recoverable the damages must be stated, or such facts stated as leave nothing for the court to do except to make a mere mathemat-

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ical computation; but the basis of fact essential to the support of the appellant's position is entirely wanting, inasmuch as the special verdict does assess the damages. It is true that the assessment is in the alternative; this is, however, the usual and appropriate method of stating the assessment in special verdicts."

It has been the practice, under the old form of verdicts, for the jury to make the assessment of damages in the alternative form.

In slander, if the words are actionable of themselves, the plaintiff is not bound to show by proof that he has sustained actual damages. *Yeates v. Reed*, 4 Blackf. 463, 32 Am. Dec. 43.

If the plaintiff is not required to prove actual damage, the jury should not be required, before assessing a penalty, to find the amount of damages in dollars and cents.

After having found all the facts entitling appellee [plaintiff below] to a verdict, the jury proceeded to assess his damages. The jury made an assessment, which it was their province to make according to a formula submitted to them by the court, to which appellant did not except.

We would not be understood as holding that a jury might make an assessment without a finding of facts on which such assessment could be fairly based.

It being the duty of the jury to assess damages, it was the duty of the court to see that they discharged this duty. In this case, the assessment is made in the alternative form.

In *Bowser v. Bower*, *supra*, a case in which a special verdict was returned under the act in question, the appellant contended that it was insufficient for the reason that it did not conclude with the usual formula: "If, upon the facts found, the law is with the plaintiff," etc. The court, by Jordan, C. J., said:

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“While it is the proper practice for a special verdict to contain a formal conclusion substantially as the one insisted upon by counsel, still the absence of such a conclusion will not vitiate a special verdict, which in other respects is sufficient.

Thus, the formula submitted by the court and adopted by the jury is approved by at least two decisions of our Supreme Court. The facts warranting the assessment are all found, and it not appearing that the appellant was prejudiced by the form in which such assessment was made, we think that it should be sustained.

It is the settled policy of the courts to give effect to the verdict of a jury without reference to its form whenever it can be done without doing violence to the law. *Daniels v. McGinnis*, 97 Ind. 549; *Thayer v. Burger*, 100 Ind. 262; *Crow v. Carver*, 133 Ind. 260; *Clark v. Clark*, 132 Ind. 25; *Balue v. Taylor*, 136 Ind. 368; *Purner v. Koontz*, 138 Ind. 252; *Louisville, etc., R. W. Co. v. Lucas*, 109 Ind. 583, 6 L. R. A. 193; *Evansville, etc., R. R. Co. v. Taft*, 2 Ind. App. 237.

We conclude that the court did not err in the rulings of which appellant complains.

Judgment affirmed.

THE STATE v. CAMPBELL.

[No. 2,401. Filed April 22, 1897.]

CRIMINAL LAW.—*Agent of Foreign Insurance Company Doing Business Without Authority.*—*Sufficiency of Affidavit.*—An affidavit charging defendant with unlawfully doing business as agent of a “certain foreign insurance company of a state other than the State of Indiana,” is insufficient to charge an offense, under section 4915, Burns’ R. S. 1894, making it unlawful for any agent of any insur-

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ance company incorporated in any other state than the State of Indiana, to transact business in this State without first producing a certificate of authority from the State Auditor.

From the Vermillion Circuit Court. *Affirmed.*

Howard Maxwell and F. F. James, for State.

John A. Wilterwood, for appellee.

ROBINSON, J.—This case was transferred to this court by the Supreme Court.

Appellee was charged with a violation of section 4915, Burns' R. S. 1894. The State appeals, and assigns as error the sustaining of appellee's motion to quash the affidavit.

Section 4915, *supra*, makes it unlawful "for any agent or agents of an insurance company incorporated by any other state than the State of Indiana, directly or indirectly, to take risks or transact any business of insurance in this State, without first producing a certificate of authority from the Auditor of State."

The charge in the affidavit is, "that John G. Campbell, on the 10th day of January, 1895, at and in said county of Vermillion, State of Indiana, did then and there unlawfully transact certain business of insurance as an agent of a certain foreign insurance company of a state other than the State of Indiana, to-wit: doing business by and under the laws of the state of Illinois, and did then and there as such agent unlawfully take a certain risk and issue a certain policy of insurance in the name of said company, known as the Harold H. Mansfield & Company, Individual Underwriters of Chicago, Illinois, to one Erastus D. Wheeler, in the sum of," etc.

The statute in question is limited to insurance companies incorporated under the laws of a foreign state. The legislature, no doubt, had some good reason for

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limiting the statute to incorporated insurance companies of other states. At any rate, it has provided such limitation. The offense consists in doing business for a company incorporated in another state, and not in doing business for a foreign company not incorporated. We know of no statute preventing an insurance agent from doing business for a foreign company that is not incorporated under a foreign statute. To hold this affidavit sufficient, we must say that the expression, "a certain foreign insurance company of a state other than the State of Indiana," is equivalent to the expression, "Any insurance company incorporated by any other state than the State of Indiana." This we cannot do.

The affidavit was insufficient. Judgment affirmed.

MARTIN ET AL. v. BOTT, GUARDIAN.

[No. 2,124. Filed February 16, 1897. Rehearing denied April 22, 1897.]

TENDER.—*Finding of Court as to.*—A tender to be good in law must be made in the legal tender notes or coin of the United States. A finding by the court that a tender of the "lawful sum in money" is not equivalent to a finding that the tender was a legal tender *p. 450.*

SAME.—*Guardian and Ward.*—Where a guardian in an attempted settlement with his ward made to her a tender of a certain amount which was refused, and the guardian made his final report to the court and paid to the clerk thereof, for the use and benefit of his ward, the amount so tendered, less \$64.00 for taxes, expenses of making report, etc., such payment to the clerk not being the amount originally tendered, the tender was not kept good. *p. 450.*

SAME.—*When Operates as a Payment.*—Where a lawful tender of money has been made and kept good by bringing it into court and it is not accepted by the party to whom it is made, nor taken out of court, and it is found upon the trial that a larger sum is due, it operates as a payment on the sum finally recovered. *p. 451.*

APPEAL AND ERROR.—*Acceptance of Part Payment of Judgment Appealed from.*—*Statute Construed.*—Where a guardian tendered to his ward a certain sum of money in settlement and which was

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by the ward refused, and the guardian afterward made his final report and paid to the clerk the sum so tendered, less certain expenses; and the ward excepted to such report, and a trial was had in which the court rendered judgment for the ward for an amount in excess of the amount so paid to the clerk and the ward appealed therefrom, and subsequent to the rendition of such judgment, received from the clerk the amount paid by the guardian at the time of filing his report, the acceptance of such sum of money by the ward amounted to a payment on the judgment, and under the provisions of section 644, Burns' R. S. 1894, she thereby waived her right of appeal therefrom. *pp. 451, 452.*

From the Washington Circuit Court. *Appeal dismissed.*

F. M. Hostetter, for appellant.

J. A. Zaring and *M. B. Hottel*, for appellee.

WILEY, J.—The appellee was the guardian of the appellant, Laura E. Martin, *nee* Beard, and upon her marriage with her co-defendant, John L. Martin, who was of age, he attempted to settle his trust with her, but they were unable to agree upon terms of settlement. At the time of the attempted settlement, appellee offered to pay her the sum of \$1,059.59, claiming that it represented her estate in his hands after all proper credits, and she refused to accept it on the ground that such sum was not enough. December 12, 1895, the appellee, having failed to make a settlement with his ward, filed with the clerk of the proper court and county, and while the court was in session, his final report, and at the time of filing said report he paid to the clerk for the use and benefit of his ward, and of the money so tendered, the sum of \$995.79, having deducted from the sum tendered \$25.00 for his attorney in preparing and presenting his report, \$25.00 for his own services, and \$14.00 for taxes charged to said guardian in Harrison county, Indiana, for the year 1895, but which he had not paid. The appellants filed

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exceptions to this final report, and also to all preceding reports. The matter was then submitted to the court for trial, and the court made a special finding of facts, and stated its conclusions of law thereon.

It is unnecessary for the decision of this case to state all the facts found or the several conclusions of law, as the decision may fairly rest upon one or two of the findings of fact and one conclusion of law. So much of finding seventeen as is pertinent to the main question is as follows:

“And this court finds as a fact, that on December 12, 1895, there was due said Laura E. Martin from her guardian, on account of her estate in his trust, after all proper credits have been allowed, and her estate and his reports are reviewed, the sum of eleven hundred eighty-two and one one-hundredths dollars.”

The fifth conclusion of law is as follows:

“That said guardian is indebted on a final settlement with his said ward in the sum of \$1,182.01, and he should pay her that sum, including the sum paid into court, to-wit: \$186.22 should be paid to her in addition to the \$995.79 paid into court for her, and she should recover costs.”

So much of the judgment as is pertinent, which the court pronounced upon the special findings, and its conclusions of law, is as follows:

“It is therefore considered, adjudged and decreed and ordered by the court, that the said Laura E. Martin recover of said guardian, Michael Bott, as assets of her said guardianship and estate, the sum of eleven hundred and eighty-two dollars and one cent (\$1,182.01), including the tender of nine hundred and ninety-five dollars and seventy-nine cents (\$995.79), heretofore paid into court as a tender in this case, and that the said Bott shall pay into court, for the benefit of Laura E. Martin, within the period of fifteen days

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from this date, the sum of one hundred and eighty-six dollars and twenty-two cents (\$186.22), being the excess of the above recovery over the said tender.”

The appellants excepted to each conclusion of law. Their motion for a *venire de novo* and for a new trial were unavailing, and they prosecute this appeal.

The appellee has moved for a writ of *certiorari*, claiming that there is a diminution in the record. It is clear to us that there is sufficient in the record to properly present the question for which a *certiorari* is asked, and hence the motion will have to be overruled.

The appellee has also moved to dismiss the appeal upon the sole ground that since the entry of the judgment appellants have received and receipted for a part of the judgment. The facts upon which this motion is based are these: Upon the day of the entry of the judgment for \$1,182.01, the attorney for appellants called upon the clerk for the \$995.79 that had been paid to him for the use and benefit of the ward, which sum was paid to the attorney by the clerk, who took his individual receipt therefor. Afterwards, and on the margin of the order book opposite the judgment, the attorney wrote a duplicate of that receipt and signed it. That receipt is as follows:

“Received of John Stratton, clerk, nine hundred and ninety-five dollars and seventy-nine cents (\$995.79) in full of tender heretofore made by Michael Bott, guardian of and for Laura E. Martin, *nee* Beard, his ward. Dated this January 10, 1896.

F. M. HOSTETTER,

Attorney for Laura E. Martin.”

The object and purpose of appellee in asking for a writ of *certiorari*, was to bring into the record a transcript and a certification of this receipt, which was placed upon the order book and on the margin thereof, after the entry of the judgment, and also after the

transcript in this case had been made and filed in this court.

The reason for denying the writ at this time is two-fold. (1) The receipt itself having been placed upon the docket entry of the judgment after said judgment had been spread of record was in no sense a part of the record of the court; and (2) the appellants openly admit in their brief upon the motion to dismiss, all the facts set out by appellee in his application for a writ of *certiorari*, and say that said receipt was placed upon the margin of the docket containing the original judgment after the transcript had been certified and filed in this court.

There is, therefore, no reason for adding any additional expense or incumbering the record by the issuing and return of such writ, for upon the admission of the appellee, and the facts set out in the application for the writ, we are enabled to dispose of the motion to dismiss.

Appellee contends that the \$995.79 paid to appellants, and accepted by them, operated as a payment on the judgment, and having accepted the same they are inhibited, under the statute, from prosecuting this appeal. The contention of appellants is, that the \$995.79 paid by appellee into court, and by the clerk paid to them, was in the nature of a tender, and its payment into court having preceded the judgment, their acceptance of the same after judgment was not a payment thereon.

If this was a payment on the judgment, appellee's motion to dismiss must prevail. The judgment itself should be of controlling influence in the disposition of the question, and it will be observed from that portion of the judgment above quoted, that the amount of the recovery is fixed at \$1,182.01. We will, therefore, first determine the question as to whether or not

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the money brought into court on the submission, by appellee, or his final report was a tender within the meaning of the law. Appellant, Laura E. Martin, though an infant, had intermarried with her co-appellant, John L. Martin, who is a man thirty years of age, and, under section 2690, Burns' R. S. 1894 (2526, Horner's R. S. 1896), he was "authorized to account to the wife, with the assent of the husband." This he attempted to do, but failed. The only course that remained for him to pursue was to submit his final report to the court for approval or rejection and abide the judgment of the court thereon. This he did, and in his report he states fully his effort to settle with his ward and her husband, and shows that "he offered and tendered by and through one of his sureties * * * \$1,059.79 to his ward, to-wit: to her husband, John L. Martin, and to F. M. Hostetter, her attorney acting for his ward, and they refused to accept the same in full settlement with said ward." The report then shows that appellee, after making certain deductions from the \$1,059.79 for expenses and services, etc., as shown in this opinion, that he paid "into the office of the clerk of this court for the use and benefit of his said ward said sum above shown, of \$995.79, as in full settlement of said ward," etc.

It is true that in the seventh special finding the court finds that "said guardian tendered to the said Laura E. Martin the lawful sum of \$1,059.79," and in the eighth finding that "said Bott, at the time of filing said final report, paid to the clerk of this court of the sum so tendered, the sum of \$995.79." As the fifth conclusion of law the court stated: "That said guardian is indebted on a final settlement with his said ward in the sum of \$1,182.01, and he should pay her that sum, including the sum paid into court, to-wit: \$186.22

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should be paid to her in addition to the \$995.79 paid into court for her, and she should recover costs.”

Construing these findings and conclusions of law, and the express language of the final report, by the great weight of authorities, we cannot hold that the money paid into court constituted a tender. It is true the court speaks of the money paid into court as a tender, but the facts as found, measured by the law defining a tender, conclusively show that it was not a tender. The appellee did tender to his ward \$1,059.79 in full settlement with her, and the court finds that it was “the lawful sum of \$1,059.79 in money.” There is a wide distinction between the terms “lawful sum in money” and “legal tender.” A tender to be good in law must be made in the legal tender notes or coin of the United States, and there is nothing in the record showing that the money tendered appellant was of that character. National bank notes and gold and silver certificates are lawful money, and so recognized in the commercial exchanges of the United States, but they are not a legal tender.

But there is a more substantial reason why the payment of the \$995.79 to the clerk for the benefit of the appellant was not a tender, and that is, the amount so paid in is not the amount that was originally tendered or offered to her. Where a tender is made of money, that exact amount must be brought into court. *Ausem v. Byrd*, 6 Ind. 475; *Moon v. Martin*, 55 Ind. 218. Further citation of authorities is unnecessary in support of so familiar a proposition of law. Again, it has been held that a tender made upon any condition prejudicial to the party to whom it was made, if not accepted, is no tender. *Bickle v. Beseke*, 23 Ind. 18. Even if the amount first tendered to the appellee was a tender, it is shown it was prejudicial to her, in that

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it was not enough, and she refused to accept it. It was not a tender.

But if, by any strained construction, it could be said that the amount paid into court by appellee was a tender, the appellant would be in no better position than she is, for the law in this State is, that if a lawful tender of money has been made and kept good by bringing it into court, if it is not accepted by the party to whom made, nor taken out of court, and it is found upon the trial that a larger sum is due, it operates as a payment on the sum finally recovered.

In the case of *Reed v. Armstrong*, 18 Ind. 446, the court says: "If the tender is sustained by proof, and thus made good, the plaintiff does not recover unless he can show the sum so tendered was insufficient. So if the money is accepted, taken out of court by the plaintiff before verdict, and the pleading is so shaped as to continue litigation for a balance still supposed to be due, the judgment should only be for the amount found due over and above that so taken out of court. If it is not accepted or taken out of court, but a greater sum found due, still the defendant cannot retain it, but it must remain as a payment on said sum so found due."

This case is decisive of the question under consideration. The court found there was due appellant \$1,182.01, being \$186.22 in excess of the amount paid into court. The appellant did not accept or withdraw the amount paid into court until after the court had made its findings, stated its conclusions of law and pronounced judgment thereon. The money then in the hands of the clerk became a part of the judgment, and its acceptance operated as a payment thereon.

Having arrived at the conclusion that the money paid into court was not a tender, the court having included it in its findings, conclusions of law and final

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judgment, and the appellants, subsequently to the judgment, having accepted a part of the money, it must be regarded as a payment thereon, and, therefore, under the express provisions of the statute, and the repeated decisions thereunder, they waived their right of appeal.

Section 644, Burns' R. S. 1894 (632, Horner's R. S. 1896), provides, that "the party obtaining judgment shall not take an appeal after receiving any money paid or collected thereon." The courts of last resort in this State have had occasion many times to construe the statute just quoted, and it has been invariably held that the statute means exactly what it says. And it has been universally held that a judgment creditor, after having received any part of a judgment, is estopped from appealing therefrom. *Patterson v. Rowley*, 65 Ind. 108; *McCracken v. Cabel*, 120 Ind. 266; *Newman v. Kiser*, 128 Ind. 258; *Sterne v. Vert*, 108 Ind. 232; *Seigel v. Metzger*, 1 Ind. App. 367; *Monnett v. Hemphill*, 110 Ind. 299.

While it is unnecessary, we deem it highly proper to say that we have examined the record with much care, and are of the opinion that the learned court below, from all the facts found, arrived at a correct and equitable conclusion, and that this appeal is wholly without merit.

Appeal dismissed at cost of appellants.

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THE PEOPLE'S BUILDING, LOAN AND SAVINGS
ASSOCIATION v. REYNOLDS.

[No. 2,007. Filed April 27, 1897]

CONTRACT.—Breach Of.—When Complaint Need Not Allege Performance on the Part of Plaintiff.—In an action for breach of a contract containing reciprocal covenants or mutual conditions to be performed, and one of the parties puts it out of, or beyond the power of the other to perform the covenants or conditions to be performed by him, the latter is thereby relieved from such performance, and if the complaint avers such facts it will not be demurrable for failure to allege performance on the part of plaintiff. *p. 456.*

COMPLAINT.—Sufficiency of in an Action to Recover Deposits Made in a Building and Loan Association.—Demand.—An averment in a complaint in an action to recover from a building and loan association deposits made by plaintiff, which avers that defendant neglected, failed and refused to return the sums of money paid, are equivalent to a positive allegation that a demand had been made, and a return thereof refused. *p. 458.*

SAME.—Need Not Aver an Offer to Return Certificate in an Action to Recover Funds Deposited in a Building and Loan Association.—In an action to recover deposits made in a building and loan association under a certificate of stock, which, by the terms thereof, had been forfeited by nonpayment of installments, need not show an offer on plaintiff's part to return the certificate, where such certificate was brought into court as the basis of the action. *pp. 459, 460.*

APPEAL AND ERROR.—Longhand Manuscript of Evidence.—How Made Part of Record.—It must affirmatively appear from the record that the longhand manuscript of the evidence was filed in the clerk's office before being embodied in the bill of exceptions. *p. 460.*

From the Marion Superior Court. *Affirmed.*

Fishback & Kappes, for appellant.

H. Dailey and *G. R. Estabrook*, for appellee.

WILEY, J.—The appellant is a corporation organized under the laws of New York, and has its home, or principal office, at Geneva, in that state. Its name indicates the character of the association. The appel-

lant, in February, 1891, established a branch office in Indianapolis, under the management and control of an agent. The appellee subscribed for, and said agent issued to her, ten shares of stock in appellant association. Appellee sued to recover back money paid on her certificate of stock. The complaint was in two paragraphs. In the first paragraph it is averred that she had issued to her, through and by the agent of appellant at Indianapolis, ten shares of stock in appellant association, for which she was to pay in monthly installments, at said agency in Indianapolis, and no place else; that for that purpose, appellant, through its said agent, issued to her a pass, or receipt book, which she was required to present to the agent at said agency when paying her monthly installments; that she transacted all her business with the appellant through said agent, and the appellant undertook and promised to keep an agent and an agency in said city for the transaction of its business with appellee, and that the appellee was not required to communicate with appellant at its office in Geneva, New York, in transacting her business with it; that appellant, well knowing that fact, and after appellee had paid dues and installments on said certificate for the months of February, March, April, May, June, and July, 1891, to said agent in the city of Indianapolis, wrongfully withdrew said agency at Indianapolis, and though appellee tried frequently after that time to find said agent and agency, to pay further installments on said certificate of stock, she was unable to do so, because said agency had been withdrawn. The complaint further avers, that by the terms and conditions of said certificate of shares, if she failed to pay dues thereon for three consecutive months, said certificate became forfeited to appellant; that appellant did not have an agency or agent in said city to receive and receipt for

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said dues within three months from the 25th day of July, 1891, at which time she paid her last installment, and at no time during the three months next succeeding her said last payment was there an agent in said city, to whom she could pay said dues. It is also alleged that at the time of commencing the action, and prior thereto, all the time from three months from July 25, 1891, said certificate was of no value whatever, and for that reason she did not surrender or offer to surrender the same to the appellant before commencing said action, and that she brought said certificate into court for the use and benefit of appellant, and to be disposed of by it; that she was at all times ready and willing to keep and perform the conditions of said certificate on her part; that appellant has failed and refused to return to her said money so paid, but has wrongfully appropriated and converted the same to its own use.

The second paragraph of complaint is simply for money had and received.

The court below overruled a demurrer to each paragraph of the complaint. The issue was joined by a general denial, trial by the court, and judgment for appellee.

Four errors are assigned, but in the condition the record comes to us, only the first and second specifications of the assignment of error are available, and they are as follows:

First. The complaint does not state facts sufficient to constitute a cause of action.

Second. The court erred in overruling the appellant's demurrer to the first paragraph of complaint.

The appellant has waived the first assignment of error, by failing to discuss it, for counsel expressly say in their brief: "We desire to discuss only the second, third, and fourth."

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Appellant's first contention is that the first paragraph of the complaint is insufficient, because it does not aver or show that appellee performed the conditions of the contract on her part.

In an action upon a contract, the rule that the plaintiff must aver performance on his part or plead facts which will constitute a valid excuse for nonperformance, is adhered to, as we understand it, by the courts of last resort in most, if not all, of the states, and this rule is sound in principle. In a contract where there are reciprocal covenants or mutual conditions to be performed, where one of the parties puts it out of, or beyond the power of the other to perform the covenants or conditions to be performed by him, he is thus relieved from such performance, and in a complaint upon the contract, for a breach, if the complaint avers such facts, it will not be demurrable for a failure to allege performance on the part of the plaintiff.

The rule is briefly and pointedly stated in the Encyclopaedia of Pleading and Practice as follows: "In lieu of allegations of performance the plaintiff may allege facts in excuse for nonperformance." 4 Ency. of Pl. and Pract., p. 629. See, also, *Couch v. Ingersoll*, 2 Pick. (Mass.) 292; *Buess v. Koch*, 10 Hun. (N. Y.) 299.

It was held in *Ruble v. Massey*, 2 Ind. 636, that where a condition was to have been performed in a contract by the plaintiff, and he was prevented from performing it, the allegations of the complaint showing such prevention was a sufficient excuse for nonperformance.

Counsel for appellant recognize the force of this rule when they say in their brief, "*Plaintiff must plead performance, or a valid excuse for nonperformance,*" and in this admission, in view of the facts pleaded, they inadvertently admit the sufficiency of the complaint upon the point now under consideration. The demur-

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rer admits the truth of the allegations. The facts averred in the complaint clearly show that the appellant undertook and agreed to keep an agent, and maintain an agency at the city of Indianapolis to accept the monthly dues and installments of the appellee; that appellee was not required to pay them elsewhere; that in pursuance of the agreement, the appellant did so maintain an agency for six months immediately succeeding the time appellee subscribed and had issued to her the certificate of stock; that after that time such agency was discontinued and withdrawn from Indianapolis, without notice to her; that she was unable to find any person to whom she was authorized to make such payments; that such agency was discontinued for more than three months, and that by the terms of her said certificate a failure to pay for three months constituted a forfeiture thereof; and that she was ready and willing to perform her part of said contract, but was prevented from so doing by the acts of the appellant.

In *Riley v. Walker*, 6 Ind. App. 622, this court, by Lotz, J., said: "It is unnecessary to allege performance, or readiness to perform on the part of the plaintiff, where it is shown that the defendant has repudiated the contract, or affirmatively refused to perform, or denies liability under it." See, also, *Floyd v. Maddux*, 68 Ind. 124; *Mathis v. Thomas*, 101 Ind. 119; *Phoenix, etc., Life Ins. Co. v. Hinesley*, 75 Ind. 1.

We think the complaint clearly shows that the appellant, by its own acts, put it beyond the power of the appellee, within the terms of the contract, to perform the conditions imposed upon her, and excused her therefrom, and she had a right to assume, under these facts, that the appellant did not intend to comply with its terms.

These facts, as pleaded, and being admitted to be

true by the demurrer, bring the case clearly within the rules above stated, and are clearly sufficient.

It is next contended that the complaint was demurrable because it does not aver a demand before the commencement of the action. We do not think this contention is well grounded. The complaint does aver that the appellant failed, neglected and refused to return to appellee the sums she had paid as dues, installments, etc. The general rule provides that where money or property is in the rightful and lawful possession of a party, an action will not lie by one who claims possession, until a demand has been made and a delivery refused.

The averments of the complaint, that the appellant had neglected, failed and refused to return the sums of money paid, etc., are equivalent, we think, to a direct and positive allegation that a demand had been made and a return refused.

As was said by this court in *Sloan v. Lick Creek, etc., Gravel Road Co.*, 6 Ind. App. 584: "An action will not lie for property which has rightfully come into the possession of another, unless a demand has been made therefor and refused; but where the complaint alleges a conversion * * * such allegations necessarily imply a demand, and dispense with a formal allegation to that effect." See, also, *Robinson v. Shipworth*, 23 Ind. 311; *Proctor v. Cole*, 66 Ind. 576; *Bunger v. Roddy*, 70 Ind. 26; *Snyder v. Baber*, 74 Ind. 47; *Knowlton v. School City of Logansport*, 75 Ind. 103.

In the case at bar, the complaint not only charged a conversion, but alleged a refusal, neglect, and failure to return the money paid by appellee. These averments clearly imply a demand, for, as was said in *Snyder v. Baber, supra*, there could be no refusal without a demand.

In *Ferguson v. Hull*, 136 Ind. 339, it was said: "As

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to the second objection, that no demand was made, this is obviated by the allegation that defendants refused to pay. These allegations impliedly show a demand, otherwise there would not likely have been a refusal to pay. But if they refused to pay, even without demand, this was a waiver of demand, an act by them that relieved plaintiffs from the necessity of making demand."

The insistence of the appellant that the complaint is insufficient for a failure to aver a demand, is therefore untenable.

The third objection to the sufficiency of the first paragraph of the complaint, as urged by appellant, is that it does not aver that the appellee offered to surrender her certificate of stock before the commencement of the action.

We are not cited to any authority in support of this contention, and no argument, further than the assertion that "such surrender must be made before suit, to be of any avail." The complaint does aver that "said certificate was of no value whatever, and for that reason she did not surrender or offer to surrender the same to the defendant before bringing this action. She now brings said certificate into court for the use and benefit of the defendant and to be disposed of by it." It is admitted by the demurrer that the certificate of stock became worthless and was of no value whatever, and hence it was unnecessary to allege an offer to return or surrender it before suit. By the express terms of the certificate, as alleged in the complaint, a failure to pay the monthly installments for three successive months, worked a forfeiture of it, and this fact appellant was bound to know. It being forfeited, it was necessarily without value, and that forfeiture resulting from the acts of the appellant, it can not now complain that no offer was made to surrender

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it, and especially is this true in view of the fact that it was brought into court for the use and benefit of the appellant.

The complaint states a good cause of action, and the court did not err in overruling the demurrer thereto.

Appellant strongly urges that the court erred in overruling its motion for a new trial. The only question discussed is, that the "*decision of the court is not sustained by sufficient evidence, and is contrary to law.*" The third specification of the assignment of error is, that the court erred in overruling appellant's motion for a new trial.

The evidence is not properly in the record, and hence this assignment of error presents no question for our decision.

The bill of exceptions was signed by the trial judge November 30, 1895, and so certified by him. The long-hand manuscript of the evidence, as transcribed by the official reporter, was filed in the clerk's office. December 9, 1895, and this fact is certified by the clerk, under the seal of the court.

It will be observed that it affirmatively appears that the longhand manuscript of the evidence was not filed in the clerk's office until nine days after it was embodied in the bill of exceptions.

Under the repeated decisions of the Supreme and this court, the evidence is not in the record, and appellant's motion for a new trial, on the ground that the "decision is not supported by sufficient evidence and is contrary to law," raises no question for our decision.

We find no error in the record, and the judgment is affirmed.

THE SCHOOL CITY OF LAFAYETTE v. BLOOM.

[No. 2,159. Filed April 28, 1897.]

SCHOOLS.—Contract with Teacher.—Power of School Board to Revoke
—A board of school trustees cannot summarily, without cause, revoke a contract of employment made with a teacher before the commencement of the term of service specified in the contract, under a provision in the contract that the employment is subject to the right of the board to remove such teacher at any time upon two weeks' notice. *pp. 466-469.*

PLEADING.—Answer Must Proceed Upon a Definite Theory.—An answer in bar must deny, or confess and avoid; it cannot do both. It must proceed upon a definite theory, either of denial of the cause of action, or of confessing it and showing new matter in avoidance. *p. 468.*

APPEAL AND ERROR.—Bill of Exceptions.—Longhand Manuscript of Evidence.—The longhand manuscript of the reporter's shorthand notes of the evidence and of the exceptions taken during its introduction is not in the record where it is not shown that the same was filed with the clerk before it was incorporated in the bill of exceptions. *p. 469.*

From the Tippecanoe Superior Court. *Affirmed.*

George P. Haywood and Charles A. Burnett, for appellant.

R. P. Davidson and Thompson & Storms, for appellee.

BLACK, J.—The appellee, Hattie B. Bloom, in her complaint against the appellant, filed on the 22d day of March, 1895, showed that she was employed by the board of school trustees of the city of Lafayette, on the 31st day of May, 1894, by written contract, to teach in one of the grades in the school buildings of said city for the term of ten months, being the school year commencing on the 10th of September, 1894, at the rate of \$50.00 per month. The inability of the appellee to set out a copy of the contract was shown, and

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it was further shown that on the 8th of June, 1894, she was notified in writing by the board that her appointment under said contract was revoked, and that her services would not be required the coming school year; that in said notice no cause was assigned for such revocation, and that the revocation was without cause; that at the time of said appointment, and at all subsequent times, she had a license to teach in the common schools of said city, duly granted and issued by the county superintendent of the common schools of Tippecanoe county; that on the 7th of September, 1894, she notified the board that she held herself in readiness to perform her part of the contract and to obey any commands of the board relating to her duties as teacher under said contract, and she demanded of the board to be allowed to occupy her position as teacher under said contract, and notified the board that she would be present at the opening of the schools on the 10th of September and would take charge of her room and perform her duties as teacher; that thereupon the board notified her that it would be useless for her to do so, for they had employed another teacher to take appellee's place, that her services were not needed as a teacher in that school, and that they had no other position as teacher for her. The complaint further showed that the appellee had held herself in readiness, and was still in readiness to teach as directed by the board in accordance with said contract, and alleged that she had been damaged in the sum of \$500.00, for which sum judgment was demanded.

The appellant answered by a general denial, and filed a second paragraph of answer, a demurrer to which was sustained. This ruling is assigned as error.

In the second paragraph of answer it was, in substance, alleged, that on the 28th of May, 1894, the appellant entered into a written contract with the ap-

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appellee, whereby the latter was appointed as a teacher in the schools of said city at a salary of \$50.00 per month, subject to the rules and regulations of the city schools and the laws of the State of Indiana; that said appointment was for no definite time, but was subject to revocation by the defendant upon two weeks' notice to be given the appellee by the appellant; that it was understood between the parties that the services of the appellee as such teacher, if not sooner revoked, were to commence at the beginning of the school year of said city, which commenced September 10, 1894, which written appointment was accepted in writing, with all its conditions by the appellee. A copy of the appointment, with its acceptance by the appellee, is set out in the answer as follows:

“OFFICE OF PUBLIC SCHOOLS. }
LAFAYETTE, IND., May 28, 1894. }

Miss Bloom: At a meeting of the Board of Trustees of the Public Schools of this city, held May 28, 1894, you were appointed teacher at a salary of \$50.00 per month, subject to the rules and regulations of the city schools and the school laws of Indiana. This appointment is made subject to your agreeing not to resign from the position without giving this board at least two weeks' notice thereof; and should you resign without giving such two weeks' notice to this board, you to forfeit two weeks of the salary due; and the appointment is also made subject to the right of this board to remove you from the position at any time upon two weeks' notice to you. Please sign your name below, and return this letter within five days, if you accept the appointment.

Yours respectfully,

BARNEY SPITZNAGLE, Secy.”

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"I accept the appointment subject to all the conditions enumerated above.

HATTIE B. BLOOM."

It was further alleged, that after the making of this contract, not desiring the services of the appellee as such teacher, the appellant revoked the appointment in accordance with the terms of the contract, upon the 9th of June, 1894, and presented to her a written notice to that effect. This notice is set out as follows:

"W. S. WALKER,
W. E. DOOLITTLE, } Trustees. EDWARD AYERS,
BARNEY SPITZNAGLE, } Supt."

"PUBLIC SCHOOLS, }
LAFAYETTE, IND., June 9, 1894. }

"Miss Bloom: The Board of Trustees of the public schools of this city, Lafayette, Indiana, hereby notify you that, in accordance with the terms of our written communication to you of the 28th of May, 1894, your appointment is revoked, and your services will not be required the coming school year.

Yours respectfully,

BARNEY SPITZNAGLE, SECY."

It was further alleged that the appellee was not employed to teach any particular school, or for and during the school year beginning September 10, 1894; but only for such time as said appointment remained unrevoked; that it was revoked by giving more than two weeks' notice thereof, as aforesaid.

The important question in the case is, whether or not the board had authority thus to revoke the appointment summarily, and without cause.

By the appointment and the acceptance thereof a contractual relation was established. Thereupon, notwithstanding the contract was wholly executory, each party became bound and each acquired rights.

The parties to an executory contract may rescind it

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by mutual consent, but they each have a right to insist upon the maintenance of the contractual relation up to the time of performance, as well as the right to performance when the proper time arrives. It is the duty of one who has employed another to receive him into the service; and if he refuse to do so without good cause, this will constitute a breach of contract for which an action will lie. *Hochster v. De La Tour*, 2 El. & Bl. 678.

It was said of one employed as a teacher and discharged before the time for the commencement of the service, in *Farrell v. School District*, 98 Mich. 43, 56 N. W. 1053: "She had the right to enter upon the service, and have her competency determined by the service rendered." See, also, *Brown v. Board of Education*, 29 Ill. App. 572; *Reubelt v. School Tp., etc.*, 106 Ind. 478; *School Town of Milford v. Powner*, 126 Ind. 528; *School Town of Milford v. Zeigler*, 1 Ind. App. 138; *Jackson School Tp. v. Shera*, 8 Ind. App. 330.

The authority of the board to employ teachers is given by the statute in general terms, as is the authority to make other contracts. Section 5920, Burns' R. S. 1894 (4444, R. S. 1881); *Reubelt v. School Tp., etc.*, *supra*.

We have a statute, section 5988, Burns' R. S. 1894 (4501, Horner's R. S. 1896), providing for the dismissal of teachers in certain cases by a trustee, "but only upon due notice and upon good cause shown."

In *City of Crawfordsville v. Hays*, 42 Ind. 200, it was held that this provision has no application to incorporated towns or cities; that there is no statutory provision requiring or authorizing trustees in cities and incorporated towns to dismiss teachers; that the correctness of the action of the trustees in the dismissal of a teacher must be tested by the general principles

of law applicable to the case; and that where a teacher has been employed for a definite length of time and has in all respects fulfilled the contract on his part, and has discharged all the obligations resting upon him as a teacher, he cannot legally be discharged from employment without his consent, until the expiration of the term of his employment.

But it is contended that the action of the board in revoking the appointment of the appellee was within the authority reserved in the contract to remove her from the position upon two weeks' notice. It is sought in the answer to show the rightfulness of the discharge under that provision.

Both of the provisions for notice in the contract before us, contemplated the actual entry of the appointee upon the performance of the service before either of these stipulations would become applicable. The contract conferred upon the appointee a right to assume, not an office, but a place of service, denominated in the appointment as a position, when the proper time should arrive. She was to accept within five days, but there was no provision concerning a relinquishment of the right to enter upon the employment or abandonment of the engagement at any time before the date for entry upon the service; but the contract contained provisions relating to a resignation from the position when the conditions should be such that she would forfeit two weeks' salary then due if she should resign without giving the two weeks' notice, without the giving of which she agreed not to resign from the position. That was the agreed penalty for such resignation as was contemplated by the contract.

A similar intent is apparent in the provision, in the same connection, that the appointment was made subject to the right of the board to remove her from the position at any time upon two weeks' notice to her.

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It was to be a notice that two weeks after the giving thereof she would be removed from the position. Manifestly, it was the intent that if she resigned, not in accordance with the contract, she would lose the salary for two weeks already served, but if she resigned in accordance with the contract she would earn and receive two weeks' salary after the notice of her resignation, and that if she were removed in accordance with the contract, she would have the opportunity to serve and earn salary for two weeks after notice of the purpose to remove her. The removal contemplated was not a repudiation of the contract before the commencement of the service. It was spoken of as a removal from the position, and not as a revocation of the appointment. A summary revocation of the appointment without any previous notification was not a removal from the position upon two weeks' notice to her. It matters not that the revocation was in the vacation before the time for commencing the service under the contract. The board had not reserved a right to so revoke the appointment, but had imposed a condition which, being the only reservation, was inconsistent with such a right.

If it be insisted that in the reservation of the right of the board to remove, it was not expressly provided that she should be allowed to go on and earn and receive two weeks' salary after the notice, and that the right was reserved to remove at any time upon such notice, yet the removal was to be from the position which she could not resign without the penalty of loss of salary due, and no right to remove subject to a specified penalty was reserved, but the right was reserved only upon two weeks' notice. The right of removal upon notice merely contemplated by the contract did not exist aside from the contract, and, assuming the binding force of the reservation, a revoca-

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tion not covered by it would subject the board to such liability as would exist in case of a revocation in the absence of any reservation concerning revocation or discharge.

It is shown by the answer that the appointment related to a certain school year, in which, beginning at a certain day, she was to hold a position and to teach at a salary of a certain amount by the month, or for each successive month, subject only to the right of removal upon the notice for two weeks given during the course of her services, and to the implied right of removal for sufficient cause.

The complaint proceeds upon the theory that the employment was for a definite period, that the appellee was employed to teach for the term of ten months, being the school year commencing at a specified date; and that the appointment was revoked without cause. The special answer seeks to excuse the revocation by relying upon the terms of the contract. It is also alleged in the answer that the appointment was for no definite time, that the appellee was not employed to teach for or during the school year, but only for such time as the appointment remained unrevoked. And it is not shown in the answer that there was any cause for the revocation.

An answer in bar must deny, or confess and avoid; it cannot do both. It must proceed upon a definite theory, either of denial of the cause of action or of confessing it and showing new matter in avoidance.

If the answer before us be regarded as in confession and avoidance, that is, admitting the material allegations of the complaint, and avoiding them by showing a contract authorizing a revocation of an employment for a definite period by reason of the provision for notice of removal, then, as we have attempted to show, the revocation stated was not within the provision set

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forth. If the answer be regarded as showing a revocation pursuant to a contract which was for no definite time, then the answer would be an argumentative denial, and as the first paragraph was a general denial, there could be no available error in sustaining the demurrer to the second.

If it was intended to plead in confession and avoidance, and to inject into the pleading also a denial, then, if the new matter did not avoid the cause stated in the complaint, the denial could not rescue the pleading from attack by demurrer, where another paragraph of denial remained.

We, of course, do not decide that the board could not revoke an appointment before the commencement of the service, or summarily and without notice remove a teacher, during the course of the service, upon sufficient cause, but there is here no question relating to revocation or removal for sufficient cause. The appellant's contention is for a supposed right to revoke summarily, at pleasure and without cause, the claim being based upon a contract which did not confer such right.

The overruling of the appellant's motion for a new trial is assigned as error, and in argument it is claimed that the court erred in the admission of certain evidence, and in giving instructions to the jury.

The longhand manuscript of the reporter's shorthand notes of the evidence and of the exceptions taken during its introduction does not appear to have been filed in the clerk's office before it was incorporated in the bill of exceptions containing it. Under decisions, which have become quite numerous, of the Supreme Court and of this court, the longhand manuscript is not properly before us.

In the absence of the evidence we are unable to see

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any available error in the instructions discussed by counsel.

The judgment is affirmed.

THE BOARD OF COMMISSIONERS OF CARROLL COUNTY
ET AL. *v.* POLLARD ET AL.

[No. 2,428. Filed April 28, 1897.]

COSTS.—Attorney's Fees.—Allowance of by Court.—Change of Venue.

—*Statutes Construed.*—An allowance made to attorneys who have been appointed to assist in the prosecution or defense of a criminal cause by the court of the county to which a change of venue has been taken and in which the trial thereof was had under sections 1847, 1848, Burns' R. S. 1894, is not conclusive against either the claimants or the county from which the cause was removed; the amount so fixed is only *prima facie* evidence of the correctness of the sum allowed and may be inquired into by either party. *pp. 473, 474.*

SAME.—Attorney's Fees.—Change of Venue.—Jurisdiction.—Where an allowance has been made to attorneys for assisting in the prosecution and defense of a criminal cause by the court of a county to which a change of venue had been taken, and the cause tried, and thereafter such claims were allowed in part by the board of commissioners of the county from which the cause was removed, such county will not be bound by a judgment of the court of the county to which the change of venue had been taken, made thereafter on petition of the claimants. *pp. 478-481.*

CHANGE OF VENUE.—Allowance of Costs and Expenses.—Statute Construed.—Section 418, Burns' R. S. 1894 (414, R. S. 1881), providing for the manner of allowance and payment of costs and expenses in changes of venue, in so far as it applies to criminal cases, has been superseded and impliedly repealed by sections 1847, 1848, Burns' R. S. 1894 (1778, 1779, R. S. 1881). *pp. 473, 476.*

From the Cass Circuit Court. *Reversed.*

L. D. Boyd, John C. Nelson and Quincy Myers, for appellants.

McConnell & Jenkins and John H. Gould, for appellees.

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ROBINSON, J.—This cause was transferred to this court by the Supreme Court. *Board, etc., v. Pollard* 147 Ind. 297.

In October, 1895, one Whitmore was indicted in Carroll county for murder, and the appellees, Charles R. Pollard and Robert C. Pollard, as the firm of Pollard & Pollard, were, by the Carroll Circuit Court, appointed to assist the prosecuting attorney in his prosecution. Upon the application of the defendant to defend as a poor person, the court appointed M. A. Ryan and Smith & Julian as counsel for the defendant. The venue was then changed to the Cass Circuit Court, and that court appointed the firm of Fansler & Mahoney as additional counsel for the defendant. A trial was had, and the Cass Circuit Court made allowances to the attorneys as follows: to M. A. Ryan, \$850.00; to M. F. Mahoney, \$750.00; to Smith & Julian, \$850.00; to Thomas B. Wilbur, prosecuting attorney, \$400.00; to Pollard & Pollard, \$1,500.00. These allowances were certified to Carroll county and were allowed in part by the board of commissioners of that county. At the next term of the Cass Circuit Court the appellees, Pollard & Pollard, M. A. Ryan and M. F. Mahoney, filed their separate petitions under the original number and cause of the *State v. Whitmore*, asking a correction of the original orders of allowance to them, respectively. The prayer of the respective petitions was to direct the auditor of the proper county to draw his warrant upon the treasurer thereof and for other proper relief. The petition asked for an order for notice to the boards of commissioners of Carroll and Cass counties, respectively, of the pendency of the petitions. The court ordered that the original cause be re-docketed, that the notices be given, and notice was served on the individual members of the board of each county. Appellants entered

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their several appearance and moved to quash the notice and also to strike out the several petitions, which motions were overruled and exceptions saved. Various pleas and objections to the proceedings were interposed by appellants, and upon issues joined between the parties, and a hearing, the court found in favor of appellees and against the board of Carroll county, and ordered that the following sums be paid by that county, namely: to appellee, M. F. Fansler, \$750.00; to M. A. Ryan, \$850.00; to Pollard & Pollard, \$1,500.00. The board of commissioners of Carroll county filed a motion for a new trial, which was overruled, and from the order of the court making the allowances to the appellees, appellants have appealed, and assign numerous alleged errors through which they each ask a reversal.

After motions to quash the notices and to strike out the petitions had been overruled, the board of Carroll county filed its verified plea in abatement, denying the court's jurisdiction and setting up the facts that at a duly convened session of the board the claims set out in the petitions were filed with the auditor of Carroll county, Indiana, and were presented to the board and each allowed in part; that from said orders of allowance no appeal was taken and no action on account of such claims had been brought against Carroll county, or the board of commissioners of that county or any other person or persons representing Carroll county, prior to the filing of these petitions. To this plea a demurrer was sustained.

The correctness of the court's rulings on the various motions and pleas interposed depends upon one question, and that is whether the court had jurisdiction of the parties and of the subject-matter.

This appeal is prosecuted, and the case was tried, upon the theory that the allowances made upon the

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petitions filed have the force and effect of judgments against Carroll county, and upon that theory the appeal will be determined. Appellee's counsel say in their brief: "We are free to say that the appellants were made parties in order that they might be bound by the orders sought." As stated in the opinion of Jordan, C. J., transferring the case to this court: "The essential feature of the case, and the one which indicates its character, is the demand for a recovery of a money judgment."

For the payment of costs and expenses in changes of venue in criminal cases, the statute provides: "In all changes of venue from the county, the county from which the change was taken shall be liable for the expenses and charges of removing, delivering and keeping the prisoner, and the *per diem*, allowance and expenses of the jury trying the cause, and of the whole panel of jurors in attendance during the trial." "All costs and charges specified in the last preceding section, or coming justly and equitably within its provisions, shall be audited and allowed by the court trying such cause; but where specific fees are allowed by law for any duty or service, no more or other costs shall be allowed therefor than could be legally taxed in the court from which such change was taken." Sections 1847, 1848, Burns' R. S. 1894 (1778, 1779, R. S. 1881).

Section 418, Burns' R. S. 1894 (414, R. S. 1881), in so far as it applies to criminal cases, has been held superseded and impliedly repealed by sections 1847 and 1848, *supra*; *State, ex rel., v. Miller, Aud.*, 107 Ind. 39.

Conceding, without deciding, that the Cass Circuit Court had the power to re-docket the case of the *State v. Whitmore* upon the filing of these petitions at a subsequent term of the court, and that it had the power to modify an order it had previously made in

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connection with that case, yet it would not necessarily follow that it could, by any modification then made, bind anyone not originally a party. The petitions asked for the modification of an order previously made in a certain case and the effect of such a modification would necessarily be limited to the parties who were before the court when the original order was made.

It was proper for the Cass Circuit Court to make allowances to appellees for their services, and to fix the amounts. But appellees' rights against Carroll county would not have been prejudiced had the court made no allowance. When appellees had been appointed by the court and had performed the services their right to present a claim against Carroll county was complete. The liability of the county for the value of the services arose from the performance of the services upon the order of the circuit court and not from the order of the circuit court making the allowance.

In *Board, etc., v. Courtney*, 105 Ind. 311, the court said: "In the orderly course, it should be audited and allowed by the court, but the services having been performed upon the order of the court, the obligation of the county to pay exists nevertheless, and the failure of the court to make the allowance does not discharge the county from its obligation. * * * Since the amount fixed by the court is not, and could not be, conclusive as an adjudication, the failure to allow anything does not deprive the claimant of his rights."

Since the order of the court fixing the amount can not be conclusive as an adjudication, either as against the claimant or against the county, the allowance, when the amount is fixed, is only *prima facie* evidence of the correctness of the sum allowed and may be inquired into by either party. Thus, in the case of *Board, etc., v. Summerfield*, 36 Ind. 543, the court said: "We think that the evident meaning of the legislature

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was that the court trying the cause should settle and determine the number of days that the jurors and associate judges were engaged in such trial, and the expense of removing, delivering, and keeping the prisoner, and the sum that the officers of the court were entitled to. We think that the allowances by the court do not conclusively determine the rights of the persons affected thereby, but the sums allowed will be presumed to be correct as to amounts, where the persons to whom such allowances were made were legally entitled to costs or charges. * * * When a person under the law was entitled to some allowance, the sum settled and allowed by the court will be *prima facie* evidence as to the correctness of the amount allowed; but where the person in whose favor such allowance is made is not, under the law, entitled to either fees, charges, or expenses, then such allowance will be void."

This doctrine is expressly approved in *Board, etc., v. Courtney, supra*, and in *Trant, Aud., v. State, ex rel.*, 140 Ind. 414. In this last case it was held that "sections 1847, 1848, Burns' R. S. 1894 (1778, 1779, R. S. 1881), *supra*, are substantially the same as sections 99 and 100, R. S. 1843, set forth and construed in the case of *Board, etc., v. Summerfield*, 36 Ind. 543, and must receive the same construction."

It is true, the case of *Board, etc., v. Courtney, supra*, holds that when such a claim is audited and allowed by the court, and duly certified, no discretion remains with the auditor to whom the account is certified. But this holding was overruled in *Trant, Aud., v. State, ex rel., supra*.

Counsel for appellee cite the case of *Gill v. State, ex rel.*, 72 Ind. 266, in support of their contention that the appellants having had an opportunity to contest these allowances are bound by the judgment of the

court. But the statute under which that case was decided has been superseded by sections 1847 and 1848, Burns' R. S. 1894, in respect to criminal cases. A comparison of the two statutes will disclose a material difference in their phraseology. The opinion itself points out the distinction between the act of 1873 and the law of 1843, which is substantially the law now in force, as follows: "The law of 1843, referred to, provided that the costs and charges should 'be audited and allowed by the court trying the cause,' but contained no provision like that in the act of 1873, that the 'court shall certify such allowance to the auditor of the county from which the charge was taken, and such auditor shall issue his warrant on the treasurer of the county for the amount so allowed and certified.' " The court held that this provision of the act of 1873 was mandatory and permitted of no discretion on the part of the auditor, and that such officer would be compelled by mandate to draw his warrant. But as we have seen under the present statute, which is substantially the law of 1843, the auditor cannot be compelled by mandate to draw his warrant for such allowance. *Trant, Aud., v. State, ex rel., supra.* In *State, ex rel., v. Miller, Aud., supra*, the court said: "As to the conclusiveness of allowances made under the provisions of sections 1778, 1779, in question [1847 and 1848, Burns' R. S. 1894], we think they ought to stand substantially upon the same footing as those made under the two sections of the Revised Statutes of 1843, set forth and construed in the case of *Board, etc., v. Summerfield*, 36 Ind. 543. Upon that point the case of *Gill v. State, ex rel., supra*, to which allusion has been made, is not a precedent of binding authority, since it was decided under a law different from the statutory provisions, both of 1843 and 1881, and no longer in force in criminal cases."

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We know of no statute that would permit appellees to sue the board of commissioners of Carroll county in the Cass Circuit Court, and, over an objection by the board to the jurisdiction, recover a judgment. Yet this is precisely the effect appellees are seeking to give to this proceeding. The Cass Circuit Court had already made the allowances and the statute fixed the county that must pay them. The statute, and not the order of the Cass Circuit Court fixed the liability of Carroll county. It was not necessary that the board of Carroll county should be brought into court to determine what part of the allowances should be paid by it. If the original orders making the allowances were incomplete or wrong, the court could have the parties, before it when the orders were made; brought in and correct them. These orders were no part of the judgment in the case of *State v. Whitmore, supra*.

A court cannot do indirectly what it could not do directly. If this judgment stands, is it proposed to issue an execution upon it against the property of Carroll county? Is the statutory right of the board of Carroll county to pass upon a claim against the county to be cut off by an original proceeding in the circuit court of another county? Is the original jurisdiction of the board, over a claim against its own county to be supplanted by another county? Is the right of every taxpayer of Carroll county to appeal from an order of the board making an allowance against the county to be foreclosed by a court of another jurisdiction?

It is provided by statute that any person having a legal claim against any county shall file it with the county auditor, to be by him presented to the board of commissioners; that the board shall examine into the merits of all claims so presented, and may in its discretion allow the claim in whole or in part as it may

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find it to be just and owing, and that no court shall have original jurisdiction of any claim against any county in this State in any manner except as provided for by statute. It is further provided that no allowance shall be made by the board unless the claimant shall file with the board a detailed statement of the items and dates of charge, nor until such competent proof thereof is adduced in favor of such claim as is required in other courts, unless the truth of such charge be known to the board, in that event it may be allowed by the board without other proof, but that fact must be entered of record in the proceedings about the claim. Sections 7945-7848, Burns' R. S. 1894. In the event a claim is allowed by the board and any taxpayer of the county feels aggrieved, or if the claim is disallowed and the claimant feels aggrieved, the statute makes provision for an appeal. Or, if the claimant prefer, he may bring an action against the county in place of taking an appeal from the board's decision. Sections 7856, 7858, 7859, Burns' R. S. 1894.

By these mandatory provisions, the board of commissioners is given exclusive original jurisdiction of all claims against the county of whatever description, except such claims as may be excepted out of the provisions of the above sections by some particular statute. So that when it is contended that a claim against a county can be collected in any manner other than these sections provide, there must be a statute prescribing in plain terms the manner in which it shall be done.

Even if the board of commissioners of Carroll county had voluntarily appeared in the Cass Circuit Court, and the members of the board had submitted themselves to its jurisdiction, that court would have had no power to render a money judgment binding on Carroll county, or to enter any order by virtue of

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which money could be drawn from its treasury. It has often been declared that boards of commissioners have no powers except such as are expressly or impliedly given by statute, and that their powers are limited and must be exercised in the manner provided by statute. *Myers v. Gibson* (Ind. Sup.), 46 N. E. 914, and cases therein cited; *Board, etc., v. Allman*, 142 Ind. 573, and cases cited; *State, ex rel., v. Hart*, 144 Ind. 107, and cases cited; *State, ex rel., v. Jamison*, 142 Ind. 679.

There is no statute conferring such power or authority, either expressly or impliedly, but, on the contrary, such authority is impliedly denied. The statutes make complete provision for the allowance of all claims against the county. And it is expressly provided that an appeal may be taken from all decisions for allowances other than for services voluntarily rendered or things voluntarily furnished, within thirty days to the circuit or superior court, the party taking the appeal giving bond against cost. Sections 7856, 7858, Burns' R. S. 1894. It has often been held that this appeal may be taken by any taxpayer of the county whether a party to the proceeding or not. *Myers v. Gibson, supra*; *Gemmell v. Arthur*, 125 Ind. 258; *State, ex rel. v. Benson*, 70 Ind. 481; *Fordyce v. Board, etc.*, 28 Ind. 454; *Miller v. Embree*, 88 Ind. 133.

This right of a taxpayer to appeal was conferred for no other purpose than that some one, directly interested, might, for the protection of the public funds, interpose defenses to claims against the county, and in many instances it has proven to be a wholesome provision. This right cannot be cut off by a board submitting itself to the jurisdiction of the circuit court of another county and permitting that court to adjudicate the claim. Thus, it is said in *Myers v. Gibson, supra*, "As boards of commissioners, under our statute, have exclusive original jurisdiction of all claims

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against the county, no court can acquire jurisdiction of a claim against the county, except where the claim, or a part thereof, is allowed, and a taxpayer appeals, or where the claim is disallowed in whole or in part, and the claimant appeals, or brings an action against the county therefor."

In *Myers v. Gibson, supra*, a board of commissioners, having disallowed a claim, agreed with the claimant to submit the matter to arbitrators, which was done, and the report of the arbitrators confirmed and the auditor directed to issue a warrant in full payment and settlement of the claim. In holding that the board had exceeded its power, the court, by Monks, J., said: "To adjudge that boards of county commissioners have such power, would render ineffectual many laws enacted for the protection of the public funds. Besides, the provisions of the statutes concerning the allowance of claims against the county, and the right of appeal therefrom, are inconsistent with, and absolutely negative the right of the board of commissioners to exercise any such power."

The proceedings disclosed by this record were an attempt to avoid the filing of these claims with the board of Carroll county, and thus preclude it from passing upon them, and, by indirection, oust the board's jurisdiction. As such, they were in direct violation of a statute, plain and mandatory in its terms. Appellees had a full and complete remedy for the collection of these claims. When the claims had been presented to the board of Carroll county, and allowed in part, and appellees refused to accept the amounts allowed, they had their choice of two remedies, and two only, one was to appeal to the Carroll Circuit Court, and the other was to bring an original action in that court. There was no authority of law to adjudicate the claim in the Cass Circuit Court, and for

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the purpose of such adjudication that court had jurisdiction, neither of the appellants nor of the subject-matter. A circuit court has the power to make orders employing counsel in criminal cases, and it has the power to audit, and allow such counsel something for their services; but it has no power to adjudicate such claim against another county and thus compel such counsel to accept an amount which might be ridiculously small, nor to compel such county to pay an amount which might be extravagantly large.

It is argued that the finding of the court is not supported by the evidence. But we do not think it necessary to enter upon a discussion of the question thus raised. The appointment of counsel in such cases is a matter in the discretion of the trial court. While, in making such appointments, the rights of the accused should be kept in view, they should not be permitted to overshadow the rights of the taxpayer. It is not necessary, on this appeal, for us to decide whether the appointments were made upon a proper showing, nor as to the amounts allowed. Upon these questions we decide nothing. We simply decide that the action of the Cass Circuit Court in bringing appellants before it and attempting by an adjudication of the claim to bind Carroll county for the payment of the sums allowed was without authority of law.

Judgment reversed at appellees' cost, with instructions for further proceedings not inconsistent with this opinion.

WILEY, J., took no part in this decision.

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NEWCOMB BROTHERS WALL PAPER COMPANY
v. EMERSON.

[No. 2,160. Filed April 29, 1897.]

CONTRACT.—Guaranty.—Notice.—Acceptance.—An agreement in the words: "Gentlemen—R. E. Emerson, of Pueblo, Colorado, desires to make purchases from your firm. I will engage to secure sales you make to the above named, in the sum of \$300.00," is not a strict guaranty, but an original undertaking, and in an action based thereon it is unnecessary to aver or prove notice of acceptance thereof.

From the Whitley Circuit Court. *Reversed.*

T. R. Marshall, W. F. McNagny and P. H. Clugston, for appellant.

Andrew A. Adams, for appellee.

HENLEY, J.—Appellant was the plaintiff below, and began this action against appellee by complaint in three paragraphs. The full text of the complaint is as follows:

"1st Paragraph. The plaintiff, a corporation duly organized under the laws of the state of Missouri, complains of the defendant, and says: That upon the 22d day of December, 1892, the defendant entered into a written contract of suretyship with the plaintiff, by the name of Newcomb Brothers, as follows, to-wit:

" "SOUTH WHITLEY, IND., Dec. 22, 1892.
NEWCOMB BROTHERS, St. Louis, Mo.

Gentlemen: R. E. Emerson, of Pueblo, Colorado, desires to make purchases from your firm. I will engage to secure sales you make to the above named, in the sum of three hundred dollars. M. B. EMERSON.'

"That subsequently to the entering in of said con-

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tract of suretyship, and upon the faith and credit thereof, and upon no other or different consideration unto the plaintiff moving, the plaintiff sold and delivered to said R. E. Emerson, goods, wares and merchandise of the value of \$300.55; for the said goods, wares and merchandise said R. E. Emerson has never paid; that the said R. E. Emerson is hopelessly and notoriously insolvent; that plaintiff, before the commencement of this suit, has demanded said sum of \$300.00 of the defendant; and that the defendant has failed, neglected and refused to pay the same. Wherefore, plaintiff prays judgment in the sum of \$350.00, and for all proper relief.

“2d Paragraph. And, for a further and second paragraph of complaint, plaintiff complains of the defendant, and says: That the plaintiff is a corporation duly organized under the laws of the state of Missouri; that as guarantor for one R. E. Emerson on the 22d day of December, 1892, the defendant entered into the following contract of guaranty with the plaintiff, under the name of Newcomb Brothers, to-wit: [Here is inserted a copy of the letter as set out in the first paragraph.] That upon the faith and credit of said contract of guaranty, and upon no other or different consideration unto it moving, the plaintiff did thereafter sell and deliver to the said R. E. Emerson goods, wares and merchandise of the value of \$300.00; that subsequently, the said R. E. Emerson became insolvent, and before he had paid for the said goods, wares and merchandise so sold and delivered to him by the plaintiff, as aforesaid; that, immediately upon such insolvency becoming known to the plaintiff, it notified the defendant of the fact of his insolvency, to-wit: on or before the 1st day of July, 1893, by reason whereof a cause of action has accrued to the plaintiff. Wherefore, plaintiff demands judgment,” etc.

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“3d Paragraph. The plaintiff, a corporation duly organized under the laws of the state of Missouri, for a third and further paragraph of complaint, complains of the defendant, and says: That upon the 22d day of December, 1892, the defendant entered into a written contract with the plaintiff, by the name of Newcomb Brothers, as follows, to-wit: [Here is set out the letter as appears in the first paragraph]; that subsequently to the entering into of said contract, and upon the faith and credit thereof, and upon no other or different consideration unto the plaintiff moving, the plaintiff sold and delivered to said R. E. Emerson, goods, wares and merchandise of the value of \$300.55, for which said goods, wares and merchandise the said R. E. Emerson has never paid; that said R. E. Emerson is hopelessly and notoriously insolvent; that upon learning of the insolvency of R. E. Emerson, plaintiff herein notified defendant herein of that fact, and received from him the following acknowledgment of his promise and contract aforesaid, and the ratification of the sale made by them to the said R. E. Emerson, to-wit:

““SOUTH WHITLEY, IND.

NEWCOMB BROTHERS, St. Louis, Mo.

Dear Sirs: Received yours of the 26th inst., notifying me of the failure of R. E. Emerson, of Pueblo, Colorado. Had learned of the failure some time ago, and that they were trying to make you safe by attachment on the goods, which I suppose has failed. Will write R. E. Emerson to-day and learn the situation; and if the account cannot be made of them, I will arrange to meet the amount vouched for, \$300.00.

Yours truly, M. B. EMERSON.’

“That, before the commencement of this suit the plaintiff demanded the said sum of \$300.00 of the defendant; and that the defendant has failed, neglected

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and refused to pay the same. Wherefore, plaintiff prays judgment in the sum of \$350.00 and all proper relief."

Appellee demurred to each paragraph of the complaint, which demurrer was sustained; and, appellant refusing to plead further, judgment was rendered against it for costs.

The only errors assigned relate to the ruling of the lower court in sustaining the demurrer to the various paragraphs of the complaint. The first paragraph of the complaint proceeds upon the theory that appellee is the surety of R. E. Emerson for \$300.00. The second paragraph proceeds upon the theory that, by the written instrument therein set out, appellee became the guarantor for R. E. Emerson for the amount of \$300.00. The third paragraph sets out the written instrument by which the appellant seeks to make appellee liable, and further alleges a written ratification by the appellee of the sales made thereunder, and an additional promise to pay.

The question now arises as to what effect shall be given to the instrument of writing upon which each paragraph of the complaint is based.

We shall not go extensively into a discussion of the different relations assumed by guarantors and sureties, or digest the cases which attempt to draw a line of distinction between contracts of suretyship and guaranty, and of the different classes of each. This court has defined guaranty to be an undertaking that the debtor shall pay; suretyship, an undertaking that the debt shall be paid. *Shearer v. R. S. Peale & Co.*, 9 Ind. App. 282.

The Supreme Court, in the case of *Nading v. McGregor*, 121 Ind. 465, 6 L. R. A. 686, said: "It is often a question of very great difficulty to determine whether a particular instrument of writing constitutes

- a strict guaranty, or whether it constitutes an original undertaking. In a strict guaranty, the guarantor does not undertake to do the thing which his principal is bound to do, but his obligation is that the principal shall perform such act as he is bound to perform, or in the event he fails, that the guarantor will pay such damages as may result from such failure.

“It is this feature which enables us to distinguish a strict or collateral guaranty from a direct undertaking or promise. So that when an instrument of writing resolves itself into a promise or undertaking on the part of the person executing it to do a particular thing which another is bound to do, in the event such person does not perform the act himself, it is said to be an original undertaking, and not a strict or collateral guaranty. In the latter class of contracts the undertaking is in the nature of a surety, and the person bound by it must take notice of the default of his principal.”

A more elaborate and extensive construction of the contract of guaranty is found in the case of *Conduitt v. Ryan*, 3 Ind. App. 1, where this court said: “The contract of a guarantor is, in strictness, his own separate contract, and is collateral to that of the principal. Strictly speaking, the guarantor does not undertake to do the very thing which his principal is bound to do. It is rather in the nature of a warranty that the thing which the principal ought to do will be done, and in the event the principal fails, the guarantor will himself thereafter answer for such failure. A guarantor answers for the default of his principal, while a surety is responsible at once on his direct promise to pay. A guarantor, unlike a surety, cannot, as a general rule, be sued with his principal, inasmuch as his liability arises strictly from his individual contract.

“A contract, or undertaking of guaranty, may, however, be so worded as to be a direct and absolute engagement to pay, and not collateral; and, although when a contract of guaranty takes that form it is, in a sense, in the nature of suretyship, it is not a contract of suretyship in such a sense as to be irrevocable.”

The question then arises, is the instrument upon which this action is founded a strict guaranty, or is it an original undertaking, to become binding upon delivery. If it belongs to the former class, notice of its acceptance was necessary to hold the appellee; if of the latter class, no notice was necessary. *Shearer v. R. S. Peale & Co., supra*; *Bryant v. Stout*, 16 Ind. App. 380; *Conduitt v. Ryan, supra*; *Lane v. Mayer*, 15 Ind. App. 382.

The late case of *Lane v. Mayer, supra*, decided by this court, seems to us to be so nearly like this case as to be decisive of the question involved herein. We quote from the opinion: “The appellees sued the appellant on the following written agreement: ‘Lebanon, Ind., November 11, 1892. Messrs. Charles Mayer & Co., Indianapolis, Ind.—Gents: I hereby agree to hold myself responsible for, and agree to pay for, any goods and merchandise which may be purchased of you by A. L. Lane, Lebanon, Indiana, to the amount of five hundred dollars (\$500.00). Wes. Lane, Cashier First Nat. Bank.’ It was averred that this instrument was delivered to the appellees, and that, in reliance thereon, they sold to A. L. Lane goods and merchandise of the value of \$180.52. There was no averment that the appellees gave the appellant notice that they had accepted the obligation and would act upon it. Nor does the evidence show that the appellees gave the appellant notice of their acceptance. It is insisted that the appellant cannot be held liable, in the absence of an averment and proof of such notice.

“If the instrument sued on is a strict guaranty, then notice of acceptance was essential before the appellant could be held liable. Without acceptance, the minds of the contracting parties could not agree upon the same terms, and no contract could be completed. Until accepted, and notice of such acceptance given, it would only be a naked proposition. But if the instrument is an original undertaking, it became binding upon delivery, and no notice of acceptance was necessary. * * * A contract, although purporting to be a guaranty, may be so worded as to make it an original undertaking. In such cases the liability of the person executing it is analogous to that of a surety on a bond. It is often difficult to determine whether or not a given instrument is an original or a collateral undertaking; and there is some conflict of authority bearing upon this subject. Each case must, in a large measure depend upon its own peculiar circumstances and words used in the contract or written instrument. * * * * * Following these recent cases, we are of the opinion that the contract declared on in this case is an original undertaking, and that it was not necessary to aver or prove notice of acceptance.”

The instrument upon which this action is founded is so worded that, under the decisions of this State, especially the later ones, it is a direct and absolute engagement to pay. Consequently, under these decisions, no notice was necessary to appellee of its acceptance.

It might be further said that appellant's argument in regard to the construction placed upon the instrument by the party bound thereby, as affects the third paragraph of complaint, is not without merit.

We are of the opinion, however, that each paragraph of the complaint states a cause of action against

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appellee. It having been suggested that the appellee has departed this life since the submission of this cause, judgment is rendered as of the term when the submission was made.

The judgment of the lower court is, therefore, reversed, with instructions to overrule the demurrer to the first, second, and third paragraphs of the complaint, and for further proceedings in accordance with this opinion.

SHAEFER v. NELSON.

[No. 1,971. Filed April 29, 1897.]

APPEAL.—Notice by Publication.—Statute Construed.—Under section 652, Burns' R. S. 1894, providing that appellant may have an order for notice by publication only when the appellee is shown to be a nonresident of the State, and that service of notice can not be had on his attorney of record, an appellant is not entitled to an order for the publication of notice against a nonresident appellee where the attorneys of record reside and have their office in the same city with appellant's attorneys, who know the relations of appellee's attorneys to the cause and their place of business, and no attempt has been made to serve notice upon such attorneys.

From the Wabash Circuit Court. *Petition to Reinstate Appeal Overruled.*

J. B. Kenner and U. S. Lesh, for appellant.

J. C. Branyan, J. S. Branyan, J. F. France and Z. T. Dungan, for appellee.

COMSTOCK, C. J.—The petition of appellant asks to have the appeal in this case reinstated. The appeal was taken after the close of the term of court at which judgment was rendered. The transcript was filed December 10, 1895. March 18, 1896, appellant filed affi-

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davits of nonresidence of appellee, and motion for notice of appeal by publication. The publication was ordered, and proof of publication thereafter filed. February 12, 1897, appellee moved to dismiss the appeal for the following reasons:

First. That the Appellate Court was without jurisdiction of appellee.

Second. That appeal was taken without filing a bond and without notice to appellee.

Third. For failure on the part of appellant to comply with rule XXXVI of this court.

The motion was sustained and the appeal dismissed February 26, 1897.

The dismissal, we think, was fully justified by the decision of the Supreme Court in *Tate v. Hamlin* (Ind. Sup.), 41 N.E. 1035. It appears by proof satisfactory to the court that appellee was a nonresident of the State; that her attorneys of record resided in and had their office in the city of Huntington, which was also the residence and place of business of the attorneys of appellant; that their relations to the cause and their place of business were wellknown to the attorneys for appellant; that no notice was attempted to be had upon her attorneys before asking for notice by publication.

In *Tate v. Hamlin, supra*, it is held that section 663, Burns' R. S. 1894, provides that when it appears to the Supreme Court by proper proof, in a cause appealed after the close of the term, that appellee is a nonresident, and that a notice of the appeal cannot be served on the attorney of record in the court below, the court may order that the notice of the appeal be given in some newspaper for three weeks, etc. Section 652, Burns' R. S. 1894, provides, that after the close of the term an appeal may be taken by service of a notice in writing on the adverse party or his attorney, and also

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on the clerk of the court in which the proceedings were had, etc., and that the appellant is entitled to an order for publication notice, only when the appellee is known to be a nonresident of the State, and that service of the notice cannot be had on his attorney of record.

Appellee appeared specially, for the purpose of moving to dismiss the appeal. She never joined in error, or agreed to the submission of the cause, nor entered a general appearance by submitting a brief on the merits of the case.

Appellant, therefore, not being entitled to notice by publication, and there being no general appearance by the appellee, and no service upon her attorneys, nor any attempt to obtain service on them when that service could readily have been had, this court had not jurisdiction, and the appeal was properly dismissed.

Rule XXXVI, referred to in the motion, should be XXXV. Rule XXXV of this court corresponds with rule XXXVI of the Supreme Court. It reads: "Where a cause appealed in vacation has been on the docket ninety days or more, and there is no appearance by the appellee, and no steps have been taken to bring him into court; or where a notice has been issued and proves ineffectual from any cause, and no steps are taken for more than ninety days after the issuance of such ineffectual notice to bring the appellee into court, the clerk shall enter an order dismissing the appeal."

The notice which was ineffectual was issued December 10, 1895. Affidavit for notice by publication was filed March 18, 1896. This is not a compliance with the rule, nor can we say that a sufficient excuse is shown for its nonobservance.

The petition to reinstate the appeal is overruled.

BEDFORD BELT RAILWAY COMPANY v. McDONALD.

[No. 2,180. Filed April 30, 1897.]

RAILROADS.—General Officers.—Power of to Employ Medical Attendance for Injured Workmen.—The president, vice president, general manager, secretary and treasurer are general officers of a railroad company and have power to employ medical attendance for workmen injured in the performance of duty in the company's service. *p. 493.*

SAME.—General Officers.—Employment of Surgeon, Not Ultra Vires.—The employment of a surgeon by the general officers of a railroad corporation to render his services to employes in case of injury in the course of their employment, without compensation other than the value of the services actually rendered, is not *ultra vires*. *pp. 495-497.*

CORPORATIONS.—Contract.—Ultra Vires.—Where a private corporation has entered into a contract not immoral in itself and not forbidden by any statute, and it has been, in good faith, fully performed by the other party, the corporation will not be heard on a plea of *ultra vires*. *p. 497.*

APPEAL AND ERROR.—Bill of Exceptions.—Longhand Manuscript of Evidence.—The record must affirmatively show that the longhand manuscript of the evidence was filed with the clerk before it was incorporated in the bill of exceptions. *p. 499.*

From the Monroe Circuit Court. *Affirmed.*

Frank M. Trissal, for appellant.

H. C. Duncan, I. C. Batman, W. H. Martin, J. R. East and *R. G. Miller*, for appellee.

ROBINSON, J.—Appellee seeks to recover the value of medical services rendered appellant's employes. The complaint is in two paragraphs. Demurrers for want of facts were overruled and appellant answered with the general issue and payment. The jury returned a special verdict, and over appellant's motion in arrest, and its motion for a new trial, judgment was rendered on the verdict. The errors assigned are the overruling of the demurrers to the complaint, the mo-

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tions for a new trial and in arrest, and in rendering judgment in appellee's favor on the special verdict.

The first paragraph of the complaint alleges that appellee is a licensed practicing physician and surgeon; that appellant is a railway corporation, organized under the laws of this State; that appellant is indebted to appellee for medical and surgical services rendered employes of appellant at appellant's special instance and request; that the services were rendered employes injured in the line of their employment in appellant's service.

It is averred in the second paragraph that appellee was employed by the president, vice president, general manager, secretary and treasurer of appellant to render medical and surgical attention to appellant's employes injured in the line of their employment in appellant's service, and particularly to employes named in a bill of particulars filed with and made a part of each paragraph of complaint, the value of which services he seeks to recover.

When this case was here on a former appeal, the complaint was held bad for failing to show that appellant was a licensed physician and that the services were rendered for workmen of appellant injured in the performance of duty, or for persons injured by its trains. *Bedford Belt R. W. Co. v. McDonald*, 12 Ind. App. 620.

A railroad corporation is under no different obligation to procure medical and surgical aid for its employes than is any other corporation or person under like circumstances.

It is well settled that the general officers of a railroad company have power to employ medical attendance for workmen injured in the performance of duty in the company's service. *Toledo, etc., R. R. Co. v. Mylott*, 6 Ind. App. 438, and cases there cited.

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On the former appeal it was said that, "A subordinate officer or agent of a corporation has no authority to employ surgical attendance for a servant injured in the performance of duty, or for a person injured by its trains, except on an urgent exigency. In such case the liability arises with the emergency, and with it expires." *Bedford Belt R. W. Co. v. McDonald, supra.*

It is said by appellant's counsel that "The reference to 'subordinate officers' could only mean, and was doubtless intended to be meant as 'subordinate' to the board of directors, and could not possibly have been used to designate some one whose rank or title was inferior to that of the general officers."

We do not think it can be said that the president of a railroad company is a subordinate officer of the corporation. The statute concerning the organization of railroad companies provides that there shall be a president of the company, who shall be chosen by and from the directors. The statute further provides that the board of directors has power to make by-laws for the management of the business affairs of the company, and prescribing the duties of officers, and for the appointment of all the officers for carrying on all the business within the object and purpose of the company. Sections 5145, 5147, Burns' R. S. 1894.

The officers named in the complaint are selected by the company through its board of directors. They are placed in a position of power by the company, and it invests them with ostensible authority. The appellee acted upon the apparent authority with which the company clothed these officers. So far as the public is concerned such officers are almost always looked upon as the corporation itself, and through them the substantial part of the business of the corporation is done. They could make the contract sued on if the corporation itself could make it, and the only question

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here is, whether the contract is beyond the power of the corporation to make.

It is stoutly maintained by appellant's counsel that such a contract is outside of the objects for which the corporation was created, and is beyond the scope of the powers granted by the act of incorporation.

In *Terre Haute, etc., R. R. Co. v. McMurray*, 98 Ind. 358, it was held that the conductor of a train could employ a surgeon to attend an injured brakeman, the conductor being the highest representative of the corporation on the ground.

In *Louisville, etc., R. W. Co. v. McVay*, 98 Ind. 391, the company was held liable for the services of a nurse employed by a roadmaster, the employment having been ratified by the general manager of the company.

In *Atlantic, etc., R. R. Co. v. Reisner*, 18 Kan. 458, it was held that the general agent of the company could employ a surgeon to attend an injured employe, the court saying: "The general agent of the company is virtually the corporation itself."

In *Swazey v. Union Mfg. Co.*, 42 Conn. 556, the business manager bound the corporation for the value of a surgeon's services in attending a boy injured in the corporation's service.

The general superintendent of a railroad company has authority to employ a surgeon to attend a person injured by one of the company's trains, whether the injured person be an employe or not. *Cincinnati, etc., R. W. Co. v. Davis*, 126 Ind. 99, 19 L. R. A. 503. See *Terre Haute, etc., R. R. Co. v. Stockwell*, 118 Ind. 98; *Terre Haute, etc., R. R. Co. v. Brown*, 107 Ind. 336.

During recent years many railroad companies have established voluntary relief departments for the purpose of accumulating a fund out of which to pay employes, who are members, sick and disablement benefits, and the courts of many states have assumed that

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the act of establishing such a department is within the express, or implied powers of the corporation. *Miller v. Chicago, etc., R. W. Co.*, 65 Fed. 305; *Lease v. Pennsylvania Co.*, 10 Ind. App. 47; *Vickers v. Chicago, etc., R. R. Co.*, 71 Fed. 139; *Donald v. Chicago, etc., R. W. Co.*, 93 Ia. 384, 61 N. W. 971; *Johnson v. Philadelphia, etc., R. R. Co.*, 163 Pa. St. 127, 29 Atl. 854; *Voluntary Relief Department, etc., v. Spencer, ante*, 123.

In Thompson on Corporations, section 5840, the author says: "An implied power will be ascribed to any corporation employing labor, to incur expense on account of injuries received by its employes in the line of their employment, in the absence of any express statutory grant of such power."

While, in a certain sense, it may be said that the complaint counts on a contract of general employment, yet there was no contract to pay appellee a certain sum as physician, nor to pay him any sum, unless some employe should be injured, and the complaint seeks to recover only for services actually rendered such injured employes. The effect of the contract was nothing more than an agreement between appellee and the corporate officers that if an employe was injured and needed medical or surgical attention appellee should render the services. If appellee performed no services he could recover no compensation. He is not seeking to recover a salary agreed to be paid him in any event, but the value of services actually rendered. A fair construction of the contract is, that no services were to be rendered unless an emergency arose for such services. We do not decide whether a corporation has power to employ a surgeon at a stated salary which he is to receive in any event, because that question is not presented by the demurrer.

We cannot agree with appellant's counsel that to

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permit a corporation to make such a contract is against public policy, and is an invasion of the rights of the injured employe. We cannot presume that the amount paid the surgeon by the company is deducted from the wages of the injured employe, nor will we presume that such a contract cuts off the right of the injured employe to call in any surgeon he may choose. The fact that the other contracting party has performed his part of the contract necessarily implies that the corporation has received the benefits of it.

The general rule is, that where a private corporation has entered into a contract not immoral in itself and not forbidden by any statute, and it has been in good faith fully performed by the other party, the corporation will not be heard on a plea of *ultra vires*. *Louisville, etc., R. W. Co. v. Flanagan*, 113 Ind. 488; *Board, etc., v. Citizens Street R. W. Co.*, 47 Ind. 407; *Thompson's Corp.*, section 6026.

The business of railroading is recognized by every one as hazardous. Persons engaged in the business are liable to be injured, and often receive injuries which the highest degree of skill and care could not have prevented. If a railroad corporation sees proper to recognize this fact, and, prompted by the highest considerations of justice and humanity, enters into a contract with a physician to give prompt attention to any of its servants who may be injured, and such attention is given injured employes, a court will not say, in a suit for the value of such services, that the contract is one beyond the power of the corporation to make. We fail to see any difference in effect between a corporation through its general officers employing a surgeon at the time an employe is injured, and employing him in advance to render services to an employe only in the event that the employe is injured.

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It is urged by appellee's counsel that the evidence is not in the record.

The record sets out the complaint, the demurrers and rulings thereon and exceptions, the answers, reply, trial, instruction requested by appellant, special verdict, motion for a new trial and ruling thereon and exception; judgment, motion in arrest, and appeal bond, in the order named. This is followed by the clerk's certificate, in which he certifies "that the above and foregoing transcript contains a full and complete copy of all the files and entries of record made and rendered in said cause, * * * * * that on the 10th day of April, 1896, the official reporter who took down the evidence in said cause on the trial thereof, filed in my office his longhand report thereof, and certified to its correctness, which is the same manuscript of the evidence incorporated in the bill of exceptions and made a part of the foregoing transcript." This is followed by what is termed the "stenographer's transcript," which contains the evidence. Following the stenographer's certificate is the following entry "And afterward a motion for a new trial, as elsewhere appearing in the record, having been filed by the said defendant, the same was, on the 16th day of March, 1896, overruled by the court, to which ruling the defendant did then and there except, and was allowed sixty days in which to file its bill of exceptions." The record then shows that, "on the 10th day of April, 1896, and within the time allowed so to do, the said defendant came and presented to the judge of said court, its bill of exceptions in said cause, containing the sworn official reporter's original longhand manuscript of his verbatim shorthand notes and report of the evidence given and delivered in the cause, etc., and asked the court to sign and seal the same and certify that it contains a full, true, com-

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plete and impartial transcript and report of all the evidence given and introduced and of all the proceedings had on the trial of said cause, and make it a part of the record thereof, which is now accordingly done (said bill of exceptions having been examined and found to be true), this 10th day of April, 1896." This is signed by the judge. In his final certificate, the clerk says: "that the above and foregoing is the identical bill of exceptions and identical longhand manuscript of the verbatim report of the evidence made by the official reporter of said court in said cause, the said manuscript having been by the defendant, on the 10th of April, 1896, filed with me, as such clerk, incorporated in said bill of exceptions, and the said bill also having been filed at the said time."

Granting there is a bill of exceptions, and that it was filed, it purports to contain nothing but the evidence, and it does not affirmatively appear from the record that the longhand manuscript of the evidence was filed in the clerk's office before it was incorporated in the bill of exceptions, or before the bill was filed as required by the statute. The evidence is not in the record. *Fitzmaurice v. Puterbaugh*, ante, 318; *Thompson v. Shewalter*, ante, 290; *Pittsburgh, etc., R. W. Co. v. Cope*, 16 Ind. App. 579.

The only ground for a new trial argued in appellant's brief is, that the damages are excessive; but as the evidence is not in the record, we cannot say that the amount fixed by the jury is too large.

There are other alleged errors assigned, but as they have not been discussed in appellant's briefs, they are deemed waived.

Judgment affirmed.

ALCORN v. BASS.

[No. 2,193. Filed April 30, 1897.]

PLEADING.—Complaint.—Sufficiency Of in an Action for Slander.—A complaint in an action for slander based upon the words spoken by defendant to plaintiff in presence of others, "Well, I believe you took it," sufficiently states the extrinsic facts from which the words derive a slanderous import, as against an objection raised for the first time after verdict, where it alleges that such words were spoken in reply to plaintiff's statement that he heard that the defendant stated that he stole the watch, and that the defendant thereby maliciously imputed to plaintiff the crime of larceny and charged that he had feloniously stolen the watch, which was of the value of twenty-five dollars. *pp. 501, 502.*

APPEAL AND ERROR.—Complaint.—Sufficiency Of.—When Defect Cured by Verdict.—When the sufficiency of the complaint is first questioned after verdict, the court will support the complaint by every legal intendment, if there is nothing material on record to prevent it; and where a fact must necessarily have been proved at the trial to justify the verdict, and the complaint omits it, the defect is cured by the verdict, if the general terms of the complaint are otherwise sufficient to comprehend the proof. *p. 502.*

SLANDER.—Complaint.—In a complaint for slander it is not necessary that the inducement and colloquium precede the statement of the words alleged to have been spoken, but is sufficient if inserted in any portion of the paragraph of complaint. *p. 503.*

SAME.—Slanderous Words.—When Question of Fact.—While it is for the court to determine what constitutes a crime or offense the imputation of which is slanderous, it is the province of the jury to determine as a matter of fact the actual meaning of the words charged in the particular case and the effective sense in which they were understood. *p. 504.*

SAME.—Complaint.—Words Charged Not Actionable per se.—How Affected by Verdict.—Where the words spoken were susceptible of an innocent meaning and a criminal meaning, the court after verdict for the plaintiff, upon a motion in arrest of judgment, or upon an assignment of error, will adopt the latter meaning, and when the language is rendered actionable by extrinsic circumstances defectively averred, the verdict will aid them, though language not actionable *per se*, in the absence of extrinsic circumstances will not be so regarded, even after verdict. *p. 504.*

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From the Gibson Circuit Court. *Affirmed.*

Martin W. Fields, for appellant.

Clarence A. Buskirk and *John W. Brady*, for appellee.

BLACK, J.—The appellee, Amelia L. Bass, sued the appellant for slander. Upon trial of an issue formed by an answer in denial, a jury returned a verdict for the appellee, assessing her damages in the sum of \$55.00. A motion in arrest was overruled, and judgment was rendered on the verdict.

The alleged errors assigned are, that the complaint does not state facts sufficient to constitute a cause of action, and that the court erred in overruling the appellant's motion in arrest of judgment.

The complaint alleged, "that at Gibson county, in the State of Indiana, heretofore, to-wit: on the 9th day of September, 1895, in the presence and hearing of divers persons, the defendant falsely and maliciously spoke and published of and concerning the plaintiff the following false, defamatory and malicious words, in a conversation then and there had and held by and between the plaintiff and defendant, to-wit, the plaintiff then and there said to the defendant, 'I heard you said I stole Alice's watch.' And the defendant in answer thereto said to the plaintiff: 'Well, I believe you took it.' That the 'Alice' mentioned in said conversation was the daughter, then and there living, of said defendant; that the 'watch' mentioned in said conversation was the personal property, then and there, of said Alice; and that in the words spoken by the defendant, above mentioned, the defendant maliciously imputed to the plaintiff the crime of larceny, and charged the plaintiff that she had feloniously taken carried away and stolen the watch aforesaid of the defendant's daughter, Alice, which watch was then and there of the value of twenty-five dollars. Where-

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by the plaintiff has been injured in her good name and reputation, to her damage in the sum of one thousand dollars, for which sum she prays judgment and all proper relief."

The evidence is not in the record.

It is contended on behalf of the appellant, that the words alleged to have been spoken by him, "Well, I believe you took it," are not slanderous *per se*, and that they could only be made actionable by proper averment of extrinsic facts giving the language charged a slanderous quality.

Our code provides, section 375, Burns' R. S. 1894 (372, Horner's R. S. 1896): "In an action for libel or slander it shall be sufficient to state, generally, that the defamatory matter was published or spoken of the plaintiff; and if the allegation be denied, the plaintiff must prove, on the trial, the facts, showing that the defamatory matter was published or spoken of him."

The code has not changed the rule as to the requirement of an inducement in the complaint, where the words are not actionable in themselves. If the words spoken derive their slanderous import from extrinsic facts, such facts must be alleged. *Ward v. Colyhan*, 30 Ind. 395; *Hart v. Coy*, 40 Ind. 553; *Emig v. Daum*, 1 Ind. App. 146.

Where, as here, the sufficiency of the complaint is first questioned after verdict, the court will support the complaint by every legal intendment, if there is nothing material on record to prevent it; and where a fact must necessarily have been proved at the trial, to justify the verdict, and the complaint omits it, the defect is cured by the verdict, if the general terms of the complaint are otherwise sufficient to comprehend the proof. *Shimer v. Bronnenburg*, 18 Ind. 363; *Harris v. Harris*, 101 Ind. 498; *Parker v. Clayton*, 72 Ind. 307; *Alford v. Baker*, 53 Ind. 279.

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The thing which will be presumed to have been proved must be something which can be implied from allegations on the record, by fair and reasonable intendment. *Peck v. Martin*, 17 Ind. 115.

Not only mere defects of form are aided by a verdict; but also faults affecting substantive facts often are so aided. *Parker v. Clayton, supra*.

In *Westfall v. Stark*, 24 Ind. 377, an averment which was a conclusion of law rather than an allegation of facts, was held after verdict sufficient to support evidence of the facts from which such a conclusion might be reached. See, also, *Smock v. Harrison*, 74 Ind. 348.

Though it is usual for the inducement and colloquium to precede the statement of the words alleged to have been spoken, it is not material that they should do so; but it is sufficient if they be inserted in any portion of the paragraph of complaint; and concluding averments of the pleading may thus render words actionable. *Huddleson v. Swope*, 71 Ind. 430.

In the case last mentioned, a paragraph of complaint averred that, on, etc., the defendant did falsely, wickedly and maliciously speak and publish of and concerning the plaintiff, to and in the presence of divers persons, "the following scandalous and defamatory words, that is to say." The complaint then set out several sets of words with innuendoes, the words so set out not being actionable *per se*. The paragraph further averred, that the defendant "by the use of said words and by each set thereof, intended to charge that" the plaintiff "had been guilty of the crime of adultery with the said Charles Hood." It was held that the concluding averments substantially supplied a more formal inducement and colloquium, and thereby rendered all of the sets of words so set out sufficient on demurrer.

If the words charged, taken in connection with the

circumstances under which they are alleged to have been spoken, were calculated to induce the hearers to suspect that the plaintiff was guilty of the crime of larceny, they were actionable. *Drummond v. Leslie*, 5 Blackf. 453.

The words alleged to have been spoken by the appellant, "Well, I believe you took it," were not actionable *per se*, but they might be so by reason of extrinsic facts including other words spoken in the same conversation. *Keck v. Derickson*, 7 Ind. 563; *Justice v. Kirlin*, 17 Ind. 588; *Keesling v. McCall*, 36 Ind. 321; *Linville v. Earlywine*, 4 Blackf. 469; *Bornman v. Boyer*, 3 Binn. 515.

While it is for the court to determine what constitutes a crime or offense the imputation of which is slanderous, it is the province of the jury to determine as matter of fact the actual meaning of the words charged in a particular case and the effective sense in which they were understood. *Thompson v. Grimes*, 5 Ind. 385; *Blickenstaff v. Perrin*, 27 Ind. 527; *Waugh v. Waugh*, 47 Ind. 580.

Where the words spoken were susceptible of an innocent meaning and of a criminal meaning, the court, after verdict for the plaintiff, upon a motion in arrest of judgment, or upon an assignment of error, will adopt the latter meaning, and where the language is rendered actionable by extrinsic circumstances defectively averred, the verdict will aid them, though language not actionable *per se*, in the absence of extrinsic circumstances, will not be so regarded, even after verdict. *McFadin v. David*, 78 Ind. 445; *Harrison v. Manship*, 120 Ind. 43.

The jury by their general verdict found that the words of the appellant were used and understood in the injurious sense attributed to them by the appellee, and taking the complaint as a whole, and consid-

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ering all its allegations of matters of fact, we think that the facts necessary in evidence to enable the jury to reach such conclusion were comprehended in the averments of the complaint.

The judgment is affirmed.

ROBINSON, J., took no part in this decision.

BALTIMORE AND OHIO SOUTHWESTERN RAILWAY
COMPANY v. WELSH.

[No. 1,918. Filed May 18, 1897.]

MASTER AND SERVANT.—*Injury to Brakeman on Construction Train.*—*Assumption of Risk.*—A brakeman on a construction train engaged in the construction of a road and making same safe for travel, knowing the road was incompleated and that no trains other than the construction train had passed over it, by the acceptance of such employment assumed all risks incident to the service, and cannot recover for an injury received while in such service by reason of a defect in such road.

From the Lawrence Circuit Court. *Reversed.*

W. R. Gardiner, C. G. Gardiner, W. R. Gardiner, Jr. and R. N. Palmer, for appellant.

Dunn & Lowe, Matson & Giles and W. H. Edwards, for appellee.

HENLEY, J.—This was an action by Michael Welsh against the Baltimore and Ohio Southwestern Railway Company, the appellant, for injuring appellee, who was an employe of the said company. The complaint is in two paragraphs. The first paragraph alleges that appellee was employed as a brakeman on a work, or construction train belonging to appellant, that there was a branch line of appellant's road about ten miles in length leaving the main line near River-

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dale in Lawrence county, and extending to the city of Bedford in said county, and that said work, or construction train was frequently run over and along said branch railway in conveying stone and freight, and in transacting such other business as a work, or construction train usually did. That there was on said branch railway between the stations of Riverdale and Bedford a wooden trestle about 200 feet in length and from 20 to 75 feet in height; that said trestle was erected on a curve of about 8 degrees, and was a part of the track of said branch railway; that said trestle was improperly constructed and was unsafe for trains to pass over; that said trestle was negligently suffered to become out of repair and to be in an unsafe condition for trains to pass over the same, and the appellant had full knowledge of such defects prior to the time at which appellee received his injuries, and that appellee did not know of such defects; that on the 4th day of October, 1893, said work, or construction train upon which appellee was a brakeman, while returning from Bedford to Riverdale, was, by reason of the careless and negligent manner in which said trestle was constructed and by reason of appellant negligently suffering said trestle to give down and thereby causing the track to be lower than the track to the approaches of said trestle, and by reason of the insufficient elevation of the outside rail of the track on said trestle, and by reason of the careless manner in which the train was at the time being run and operated, the said train left the track and appellee received the injury for which damages are demanded, and which he alleges were received without any fault or negligence upon his part.

The second paragraph of complaint contains substantially the same averments as the first.

A demurrer to each paragraph of the complaint was

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overruled and the ruling excepted to. An answer consisting of a general denial and one special paragraph was then filed. To the special paragraph a demurrer was filed and overruled. This special paragraph of answer is substantially as follows: That appellee at the time of the injury complained of and for a long time prior thereto was in appellant's employ as a brakeman upon a work or construction train; that the branch road upon which the injury occurred was at the time of such injury and accident in course of construction and was being surfaced and ballasted and was unfinished; that the construction train upon which appellee was a brakeman was being run over and along said road for the purpose of hauling ties, iron, stone and ballast to complete said railroad, its track, trestles, bridges and fills, and especially the trestle, fills and approaches where the appellee received the injury complained of. That said construction train had been engaged in hauling material for the construction of said road for a long time prior to the accident complained of by appellee, during all of which time appellee was upon said train as a brakeman; that said road was not open for business or traffic for either freight or passengers at the time appellee received his injury, and no regular train had been run over said road prior to said time because the same was unfinished as appellee well knew. That appellee was a brakeman upon the construction train during all the time said road was being built, and knew the condition of the bridges, trestles, track, etc., etc., and knew that the road was unfinished and that at the time of the injury complained of the road was being surfaced up, and the track and approaches where the accident occurred were being completed and put in line. By reason of which facts appellant says appellee is estopped to prosecute this action. To

this answer appellee filed a general denial. Upon the issues thus formed a trial by jury was had, resulting in a general verdict for appellee in the sum of twenty-five hundred dollars. In addition to the general verdict so returned, the jury found specially upon questions of fact by way of answers to interrogatories, submitted at the request of the parties to this action.

Appellant moved for judgment upon the special findings and answers to the interrogatories, notwithstanding the general verdict, which motion was overruled and appellant excepted.

Appellant moved for a new trial, which motion was overruled and judgment was rendered in favor of appellee for \$2,500.00.

The first three specifications of the assignment of errors question the sufficiency of the complaint, the fourth the correctness of the ruling of the lower court upon the motion for judgment upon the special findings, notwithstanding the general verdict, and the fifth, the ruling upon appellant's motion for a new trial. No cross errors are assigned.

We believe both paragraphs of the complaint state a cause of action, and in view of the conclusion we have arrived at as to the final disposition of this cause, it is unnecessary to further discuss it.

Appellant next complains of the action of the court in overruling its motion for judgment upon the special findings. The jury found specially in answer to interrogatories returned with the general verdict the following facts: "That the accident in which appellee was injured occurred on that part of appellant's road which was being constructed in the summer of 1893; that the road was being surfaced up and the low places and sags were being taken out at the time the accident occurred; that appellee was a brakeman on the construction train of appellant and passed over the

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place where the accident occurred on the day of the accident three times before the happening of the accident by which he was injured; that said construction train on said day was composed only of the engine, tender and caboose. That appellee was standing in the door of the caboose looking out upon the railroad track in the direction in which the train was moving at the time of the accident; that there was a low place or sag in the track at the place where the accident occurred; that any person being in the caboose of the construction train or on the engine thereof could feel the low place in the track at the point where the accident occurred by the motion of the engine or caboose in passing over the same; that such low place or sag in the track had existed several days prior to the time of the injury; that said railroad was completed on October 20, 1893; that the construction train upon which plaintiff, while acting as brakeman, was injured, had been passing over the point where the accident occurred for several weeks prior to that time and had been, and was, engaged in hauling ballast and material for the completion of the railroad; that appellant's roadmaster and supervisor, whose duty it was to inspect appellant's road, had not passed over the same and pronounced the same safe for the passage of the construction train over the same at the speed of ten or twelve miles an hour; that at the time of the accident the train was running at a speed of eight or ten miles per hour; that on the day the accident occurred there were between fifty and sixty men at work upon this track, ballasting and surfacing up, and taking the sags out of the same, and said force had been so engaged for several days prior to such accident; that the accident occurred in the day time and appellee had on the very day of the accident, in the day time, passed over this point three times prior to the accident. That

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appellee was employed continuously upon the construction train as a brakeman from the time the first rails were laid upon the railroad near the point where the accident occurred, up to the time he was injured; *that said road where said accident occurred was at the time of said accident being surfaced and was new and incomplete; that the construction train upon which appellee was brakeman hauled the iron, ties, ballast and bridge timbers to construct the railroad upon which the appellee was injured, and the appellee knew that the railroad was new and incomplete and was being surfaced up and the low places and sags were being taken out at the time of the accident.* That on the 3d day of October, 1893, appellant had hauled freight over said road; that at the time of appellee's entering appellant's service he was employed on a construction train running between the cities of Washington and Seymour, and the building of the branch road where the accident occurred was begun after appellee's employment and appellee was ordered from the main line to the new road; that appellant's roadmaster knew of the defect in the track where the accident occurred for four days prior to the time of the accident and that appellee had no knowledge of such defect."

Are the facts so found in irreconcilable conflict with the general verdict? Two elementary principles of law governing the relation of master and servant have been stated and applied in a very large number of cases by the Supreme Court of this State; the first, that the master will use reasonable diligence to furnish the servant a safe place in which to work and safe machinery and appliances, and that the servant shall not be exposed to greater dangers than those which may reasonably be expected from the nature of the work in which he engages; that if there are latent

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dangers, or dangers which the master may reasonably suppose would escape the notice of the servant, and they are known to the master, it is the duty of the master to inform the servant of such dangers. It invariably follows, then, that where a servant enters upon a hazardous employment he necessarily assumes the risks and perils incident thereto. Thus he is held to assume all risks which naturally arise from the conduct of the business and those risks which the exercise of his opportunities of inspection while giving diligent attention to such services would have disclosed to him. *Evansville, etc., R. R. Co. v. Henderson*, 134 Ind. 636; *Atlas Engine Works v. Randall*, 100 Ind. 293; *Pittsburgh, etc., R. W. Co. v. Adams*, 105 Ind. 151; *Louisville, etc., R. W. Co. v. Frawley*, 110 Ind. 18; *Ames, Admr., v. Lake Shore R. W. Co.*, 135 Ind. 363; *Lynch v. Chicago, etc., R. R. Co.*, 8 Ind. App. 516; *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327; *Rogers v. Leyden*, 127 Ind. 50; *W. C. De-Pauw Co. v. Stubblefield*, 132 Ind. 182.

And where the danger is equally open to the observation of master and servant it is assumed by the servant as an incident of the service, and it does not matter how hazardous be the nature of the service, all risks from the perils ordinarily incident to it, are assumed by the person who voluntarily enters it. The servant is bound to use his eyes to see what is open and apparent to a person using his eyes, and if he fails to do so he cannot hold his employer with the consequences of his failure to see. The jury in this cause having found that the appellee was a brakeman upon the construction train which hauled the material with which to build the road where the accident occurred; that at the time of the accident the road was new and incomplete and was being surfaced up, and the low places and sags being taken out, and that appellee

knew of these facts, the question then arises, had not appellee assumed the risk which resulted in his injury as an incident of his employment? The general rule of liability of a railroad company for negligence is not the same in the case of an employe as in the case of a passenger. In the case of an employe no presumption of negligence on the part of the company arises from the accident, and the negligence must be clearly shown in order to warrant a recovery. A different rule also applies to the employes of a railroad company engaged in operating the line, and those engaged in the work of constructing or repairing the line. The risks assumed are entirely different; in the one instance the employe has a right to presume that the place where he is sent is in a reasonably safe condition; in the other, the servant knows that he is sent to make safe the very place where he is working. The Pennsylvania courts hold that laborers on a railroad who are engaged in repairing the track take all the risks incident to the track being out of repair and its dilapidated condition. *Philadelphia, etc., R. R. Co. v. Schertle*, 97 Pa. St. 450.

“The rule that a master is bound to use reasonable care and skill to furnish his servants safe and suitable instruments and appliances to perform the services in which they are engaged, only applies where such instrumentalities are placed in their hands for use. It has no application to the safety and condition of the thing which the servant is employed to repair. Where a servant is employed to put a thing in a safe and suitable condition for use, it would be unreasonable and inconsistent to require the master to have it in safe condition and good repair for the purpose of such employment.” Section 3032, Bailey’s Per. Inj. Relat. to Master and Servant, vol. 2.

In the case of *Brick v. Rochester, etc., R. R. Co.*, 98 N.

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Y. 211, a laborer was engaged with others in repairing the track and was injured by the construction train upon which he was riding leaving the track. It was said that while the rule is generally applied, that where it is the duty of the employe of a railroad corporation in the course of his work to ride over the road, it is its duty to provide a track suitable and sufficient for the purpose, and to maintain it in good order; but the rule is qualified where the road has become dilapidated and out of repair, and is in the process of construction, in which work the servant is employed. And in that case it was held that the risk was one incident to the nature of the employment.

And it was held in the case of *Walling v. Congaree Construction Co.*, 41 S. C. 388, 19 S. E. 723, that an employe upon a construction train assumes the risk of injury from the defective condition of the road. To the same effect, see *Lindvall v. Woods*, 41 Minn. 212, 42 N. W. 1020, 4 L. R. A. 793.

In the case of *Walling v. Congaree Construction Co.*, *supra*, where a conductor in charge of a construction train used in constructing a new railroad was killed by the giving way of a portion of the roadbed, it was held that a distinction was recognized between a completed road and one in process of construction, and that he assumed the risk incident to its construction.

In *Manning v. Chicago, etc., R. R. Co.*, 105 Mich. 260, 63 N.W. 312, the court said, in substance, that a brakeman who is employed to work on a construction train, can observe that the road is unfinished and incomplete and assumes the risks incident to such unfinished and incomplete condition of the road. That as a general rule it is the duty of a railroad company to furnish its employes a safe place to work while operating its

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trains; yet the rule is qualified when a new road is being built. The employe cannot complain of the imperfect condition of a road he is employed to assist in making perfect.

Nor does it matter whether the employe, engaged in the construction or repair, actually knew of the particular defect which caused the accident, if he did know of the general bad condition and incompleteness of the track. *Green v. Cross*, 79 Texas 130, 15 S. W. 220.

And knowing that the track was new and rough and uneven, and having passed over it a great many times, and three times in daylight, on the very day of the accident, appellee must be held to have had an opportunity to know its condition and is chargeable with its risks. *O'Neal v. Chicago, etc., R. W. Co.*, 132 Ind. 110.

In the case of *Colorado Midland R. W. Co. v. O'Brien*, 16 Colo. 219, 27 Pac. 701, it was said that a person engaged to do work in and about the construction of a railroad assumes the risk of such employment, including the risk of being transported to and from his work in a construction train over a newly constructed road, and cannot expect the road and roadbed to be in a perfect and safe condition before it is finished.

The reasoning of all the cases upon this subject is very similar to that of the recently decided case of *Kanz v. Page* (Mass.), 46 N. E. 620, which was an action for personal injuries caused by the fall of a piece of iron from the ceiling of a room in defendant's factory.

We quote from the opinion: "The facts were that a fly wheel had exploded in the engine room, and the plaintiff was sent into the room to clear out the rubbish. We assume that this order was given by the defendants' superintendent, and that the defendants knew that the plaintiff was there. The defendants

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also knew the shattered condition of the room, which was obvious, but did not know that there was any iron likely to fall from the ceiling. While the plaintiff was at work, the iron fell upon him. The plaintiff's position is that it was the defendants' duty to examine the place more fully than he had done before sending him in there, and that the plaintiff had a right to rely to some extent upon their or the superintendent's having done so before sending him to work.

"We are of the opinion that the principle referred to does not apply to the case. Obviously, there are limits to the duty of employers to provide for the safety of their workmen,—limits set by what is practicable in a commercial sense, and limits set by what is naturally to be expected under the circumstances. The chief sphere of the duty is in the permanent or recurring conditions of the machinery or place where the workman is employed, so far as it is under the employer's control, where the danger is not obvious or necessarily incident to the business. * * * When a workman is sent into such a room on the day of the explosion to clear away the ruins, it is manifest that he is taking one of the steps which are necessary to disclose just what has happened. It is not a natural inference on the part of one so sent that the place has been inspected, and it is not a natural interpretation of the order to take it as implying that the superior knows that it is safe. Such an inference and interpretation are not based on the experience of life. They are mere deductions from the letter of an inaccurately stated rule of duty, assumed beforehand to cover the case. Some one must be first in the place of possible danger. The workman sent in to clean it up has no right to assume that he is not the first, nor is the employer bound in formal language to notify him that no one as yet has made certain that nothing will give way."

The cases do not proceed upon the theory that the master would be excused because of the fault of the servant, but generally upon the ground that the injury received grew out of risks assumed by the servant as incident to the employment; but it was held in the case of *McDermott v. Pacific Railroad Co.*, 30 Mo. 115, that a brakeman could not recover against the company on account of injuries received from the train going through a defective bridge, there being no allegation that the company employed incompetent servants or agents, or that it failed to exercise ordinary care in their selection, and it was held that the faulty construction and condition of the bridge was the act of fellow-servants of the brakeman. It is possible that the rule is extended too far in the last mentioned case and we do not cite it with approval.

The courts of this State have adopted the rule, when applied to an experienced adult employe, that a servant who accepts work on a construction train, by the mere act of acceptance is warned that said road is in process of construction and hence is incomplete. *Evansville, etc., R. R. Co. v. Maddux*, 134 Ind. 571.

In a case very similar to this the Supreme Court of this State speaking by Coffey, C. J., said: "In this case, however, the unfinished condition of the appellant's road was open to every one. Its condition was open to the observation of the appellee. It is not a case of latent dangers or dangers that might escape the observation of the appellee, but it is a case where everything was open alike to the master and the servant. The appellee stands in the condition of complaining of the imperfect condition of a railroad which he was employed to assist in making perfect. Had the road been completed the necessity for his employment would not have existed." *Evansville, etc., R. R. Co. v. Henderson*, 134 Ind. 636.

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The special findings of the jury show beyond controversy that appellee had an equal, if not a much better opportunity, of knowing the condition of the track and road than did appellant, and that the danger was at least equally known and open to both master and servant. That the servant by the most casual observation during the prosecution of the work could have known of the defect in the track which caused the accident.

In the case of the *Bedford Belt R.W. Co. v. Brown*, 142 Ind. 659, the Supreme Court, by Hackney, J., says: "It is the general rule that it is a duty of the master to supply safe places and appliances for the service of his employes, but it is not understood that this duty requires the master to make a powder-house a place of safety, or to make railroading as free from danger as hoeing corn, or to make the labor of bridge building, at fifty-three feet above the ground, as free from hazard as the service of an office clerk."

And in the case of *Evansville, etc., R. W. Co. v. Henderson*, 142 Ind. 596, the Supreme Court held that a servant who accepted employment to work on a construction train to run on a road not yet open for business, the track of which was incomplete, not ballasted, and imperfect, such defects were equally open and apparent to the employe and employer, and that the employe assumed all the risks incident to the employment.

It may be assumed, we think, that appellee in performing the services in which he was engaged understood that he was not working upon a road which was finished and in good repair, but upon one which was unfinished and incomplete and over which no train other than the one upon which he was employed had ever passed, and as one of the servants engaged in making safe the common working place he was sub-

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jected to greater risks and perils than would be incurred in the ordinary work on a completed road. In accepting service as a brakeman upon a construction train appellee assumed all the risks incident to such service. The sag in the track where the accident occurred and the generally unfinished and incomplete condition of the road were matters which came more directly within the observation of appellee than of appellant. He could not say he had not an equal opportunity with appellant to know of the dangers of his work.

Counsel for appellee contend that the evidence is not in the record because under numerous decisions of this court and the Supreme Court the record does not affirmatively show that the original longhand manuscript of the reporter's shorthand notes of the evidence was filed in the clerk's office prior to its incorporation in the bill of exceptions. Counsel state the rule correctly, but it is not applicable to this cause for the reason that the record nowhere discloses the fact that an official reporter was appointed and sworn to take the evidence, nor that it is the original longhand manuscript of the evidence which is incorporated in the bill of exceptions, but the whole record appears to be a transcript made by the clerk.

In view of the decision reached, it is not necessary to discuss any other alleged error brought to the notice of this court by appellant.

The special findings of the jury cannot be reconciled with the general verdict. Under the special findings appellant was entitled to a judgment in its favor. The cause is reversed with instructions to sustain appellant's motion for judgment upon the special findings and answers to the interrogatories, and render judgment thereon in favor of appellant.

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SMISER ET AL. v. THE STATE, EX REL. KING.

[No. 2,211. Filed May 18, 1897.]

INTOXICATING LIQUORS.—*Action on Saloonkeeper's Bond.*—In an action on a saloonkeeper's bond for causing the death of the husband of relatrix, a complaint which alleges unlawful sales to the husband and other persons named, and that by reason of the intoxicated condition of such persons, including the husband, in defendant's saloon, the husband was thrown and fell upon the floor and against the wall of said saloon and mortally wounded, is sufficiently definite in the absence of a motion to make more specific. pp. 520, 521.

APPEAL AND ERROR.—*Brief Must Specify the Place in Record Where Alleged Error May be Found.*—Alleged error in the admission of evidence will not be considered on appeal where no reference is made in the brief to the place in record where the evidence complained of may be found. p. 521.

EVIDENCE.—*Insurance.*—*Tables of Expectancy.*—Life insurance tables of expectancy are admissible in evidence, to be considered by the jury in connection with all other pertinent evidence in ascertaining the probable duration of the life in question, and not as fixing the expectancy of the life of the particular person, or as forming a legal basis for a calculation. p. 522.

INTOXICATING LIQUORS.—*Selling Liquor to Intoxicated Person.*—*Action on Bond.*—In an action on a saloonkeeper's bond for causing the death of the husband of relatrix in selling him liquor while in a state of intoxication in violation of section 15, act of March 17, 1875, the fact that some of the liquor by which the deceased was intoxicated was procured by him at another saloon, would be no defense, if the liquor furnished by defendant caused additional intoxication, and the injury resulted proximately to the wife's means of support because of such intoxicated condition. p. 523.

From the Daviess Circuit Court. *Affirmed.*

Posey & Chappell, for appellants.

Dillon & Greene, for appellee.

BLACK, J.—This was an action on the bond of the appellant John A. Smiser, as a licensed retailer of intoxicating liquors. The cause was commenced in

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the Pike Circuit Court. The complaint contained three paragraphs. A demurrer for want of sufficient facts was overruled as to the first and second paragraphs, and was sustained as to the third paragraph. An answer in denial having been filed, the venue was changed to the court below, where a trial by jury resulted in a verdict for the appellee for one thousand dollars. After judgment upon the verdict, a motion was made by the appellants for a new trial and was overruled.

Recovery was sought for alleged damages sustained by the relatrix to her means of support through the death of Joel R. King, her husband, on account of the use of intoxicating liquor sold in violation of the statutory provision whereby the sale of any spirituous, vinous or malt liquors to any person at the time in a state of intoxication is made a misdemeanor. See sections 15 and 20 of the act of March 17, 1875. Acts 1875, p. 55; *Mulcahey v. Givens*, 115 Ind. 286.

The appellants in argument do not prefer any objection to the first paragraph of the complaint, but contend that the second paragraph was insufficient.

The second paragraph shows unlawful sales to said Joel R. King and one Charles Hutchinson, and divers other persons to plaintiff unknown. The only objection urged against this paragraph is that it does not charge that the husband of the relatrix "was thrown by Hutchinson or any person made drunk by appellant, nor that he fell by reason of his intoxication, but by some intervening agency secured his hurt." The language of the complaint to which this objection is directed is, "that by reason of said intoxicated condition of said persons, including said King, in the saloon of said Smiser, on said day, said Joel R. King was thrown and fell upon the floor and against the wall of said saloon, whereby his head came in contact with

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some object to plaintiff unknown, whereby he, the said King, was mortally wounded," etc.

If the appellants desired more definiteness and particularity as to the manner in which said King received his injury, they should have made a motion indicating such wish. The second paragraph of complaint does not appear to be subject to the objection so urged against it. Furthermore, appellants say in their brief that no attempt whatever was made to prove any part of the second paragraph.

In argument, under the assignment that the court erred in overruling the motion for a new trial, counsel claim that there was error in the admission in evidence of a certified copy of a record, but no reference is made in the brief to a place in the transcript in which such evidence may be found. Therefore, we cannot search for it and identify it for the purpose of reversing the judgment.

A witness, Adrian Barber, who testified that he lived at Washington, Indiana, was a life insurance agent, and had in his hand a book which, he testified, was "American Experience Tables, being the collected experience of American life insurance companies of the duration of lives by them insured," was asked to read from said book how long a man at the age of forty-eight was expected to live. The witness was permitted to read from the book as follows: "At forty-eight, expected to live twenty-two and thirty-six hundredths years."

The reason urged in argument against this evidence is, that "the undisputed evidence was that the decedent King had been a sufferer from bronchitis and lung trouble, and drew a pension of ten dollars per month on that account," and that "the witness, Barber, stated that such persons were not insurable, and hence the table, which the witness claimed was a com-

pilation of the experience of the various American insurance companies, did not shed any light on the expectancy of Joel King."

A portion of the objection offered to the evidence in the court below before its admission, as shown by the record, was, "because the results shown" (by the book) "were from healthy, and not diseased persons;" but no portion of the objection was based upon any alleged state of King's health. The statement in argument that the witness "stated that such persons were not insurable," has relation, not to any previous portion of his testimony, but to his subsequent testimony on cross-examination, that "when lung trouble and bronchitis exist, insurance companies do not insure."

Furthermore, we observe that the relatrix had testified that her husband's age was forty-eight years; that he had fairly good health, and "made about enough to do us;" that "he farmed, raised corn, wheat, oats, hogs and cattle." She also testified that he drew ten dollars per month pension for lung trouble and bronchitis, and his son testified that the deceased drew a pension for bronchitis and lung trouble. There had been no other evidence relating to bronchitis or lung trouble. Another witness testified that King was an industrious man; "I always saw him doing something when I passed his place."

We might dismiss this matter without further notice. In view, however, of the character of the objection proposed by counsel in argument, it may be proper to remark that life tables are not taken as fixing the expectancy of the life of the particular person, or as forming a legal basis for a calculation, but are accepted as furnishing some evidence, to be considered by the jury in connection with all other pertinent evidence, in ascertaining the probable duration of the life in question. See Sutherland on Damages, sec-

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tion 455; Elliott on Railroads, section 1378, and cases cited. See, also, *Wilson v. Bennett*, 132 Ind. 210; *Louisville, etc., R. W. Co. v. Miller*, 141 Ind. 533, 562; *Shover v. Myrick*, 4 Ind. App. 7.

The court gave to the jury all the instructions requested by the appellants except one, concerning the refusal of which appellants say that they have no complaint to make, but they contend that the instructions given by the court of its own motion negatived those given at the request of the appellant.

We do not find such antagonism between instructions given. Taking all the instructions together, there does not appear to be any material inconsistency in them.

There was sufficient evidence to sustain the conclusion of the jury that the death of the husband of the relatrix was caused by a fall which was occasioned by the use of intoxicating liquor sold in violation of the statute.

The fact that some of the liquor, by which the deceased was intoxicated, was procured by him at another saloon, could not make a difference in favor of the appellants. If Smiser sold such liquors to the deceased when he was already intoxicated, the statute was violated; and if the liquor furnished by Smiser caused additional intoxication, and injury resulted proximately to the means of support of the relatrix because of the intoxicated condition thus existing, the appellants were liable on the retailer's bond for such result.

Counsel for appellants close their argument with a reference to what is called misconduct of counsel for the prevailing party, but fail to indicate any place in the record where the misconduct is shown.

We do not find any available error.

Judgment affirmed.

The State v. Gapen.

THE STATE v. GAPEN.

[No. 2,815. Filed Dec, 18, 1896. Rehearing denied, May 18, 1897.]

CRIMINAL LAW.—Former Jeopardy.—Constitution Construed.—The jeopardy prohibited in the provision of the State Constitution that, “No person shall be put in jeopardy twice for the same offense,” is that which grows out of the same offense, not necessarily of the same act or transaction.

SAME.—Sale of Intoxicating Liquors to Minor Without License.—Separate Offenses.—Statute Construed.—A sale of intoxicating liquor without license, and to a minor constitutes two separate offenses under section 7285, Burns’ R. S. 1894, and section 5323, Horner’s R. S. 1896 (Acts 1895, p. 250, section 6), respectively, and a prosecution for the former offense will not constitute a bar to the latter, although both violations grew out of the same transaction.

From the Hancock Circuit Court. *Reversed.*

W. A. Ketcham, Attorney-General, *Merrill Moores* and *Charles Downing*, for State.

Raymond E. Gery and *Poulson & McBane*, for appellee.

LOTZ, C. J.—Under the statute of this State it is a misdemeanor for any person to sell intoxicating liquors in quantities less than a quart at a time, when the seller has not procured a license to retail such liquors. Section 7285, Burns’ R. S. 1894 (5320, Horner’s R. S. 1896).

It is also a misdemeanor for any person to sell intoxicating liquors to any person under the age of twenty-one years. Section 5323, Horner’s R. S. 1896 (Acts 1895, p. 250, section 6).

In the case at bar, the defendant, Loren Gapen, is charged with having unlawfully sold to one William Coberly one half pint of beer, he, Gapen, not then hav-

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ing a license to sell intoxicating liquors in quantities less than a quart at a time.

To this charge the defendant filed a special plea in bar, alleging that on a prior day, the State prosecuted him in a court of competent jurisdiction for having sold intoxicating liquor to William Coberly, a minor; that issue was joined, a trial followed and he had judgment of acquittal; that the sale to the minor in that case, and the sale without a license in this, were one and the same act, transaction and offense.

The court below overruled a demurrer to this plea and this ruling is the error assigned.

It is provided by our State constitution that "No person shall be put in jeopardy twice for the same offense." The jeopardy here prohibited is that which grows out of the same offense not necessarily of the same act or transaction. The same act may constitute an offense under two or more jurisdictions; and it is well settled that jeopardy under one jurisdiction is no bar to jeopardy under another jurisdiction. It frequently occurs that the same act constitutes two or more offenses under the same jurisdiction, as for instance, a sale of intoxicating liquor on Sunday to a minor in a quantity less than a quart by a person not having a license will be a violation of three different statutes of this State, and constitute three distinct offenses.

In the case at bar the sale to the minor and the sale without a license were one and the same transaction. The same acts violated two statutes, and constitute two distinct offenses. The question presented by the record is, does the prosecution of one of the offenses to final judgment constitute a bar to a subsequent prosecution for the other offense? Or, in other words, is the defendant placed twice in jeopardy by the second prosecution?

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There is confusion and conflict in the authorities bearing on this question.

In *Wininger v. State*, 13 Ind. 540, it was held that if an assault and battery was the *gravamen*, or principal act in a riot, a conviction of the assault and battery was a bar to a prosecution for riot. And in *Fritz v. State*, 40 Ind. 18, a conviction of an affray was held to be a bar to a subsequent prosecution for assault and battery growing out of the same transaction. It is also well settled that if the act constitutes but one offense although susceptible of division into parts, as in larceny for taking several articles of goods at the same time, the State will not be permitted to split up the offense, but final judgment for taking one part will bar a prosecution for taking the other part.

And if the same act constitute two or more offenses of the grade of felony, and the offenses are of the same character, as robbery and larceny, a final judgment rendered on one will bar the other. So, also, if the same transaction constitute two or more offenses and the offenses are similar in character, as an assault and battery, and an assault and battery with intent to commit a felony, the charge of the higher offense includes the lesser, and a judgment rendered on the higher will bar the lesser. *State v. Elder*, 65 Ind. 282. But where such offenses are charged in separate indictments a judgment rendered on the lesser, will not necessarily bar the higher offense. A misdemeanor may be merged into a felony, but not a felony into a misdemeanor. The reason for this is that the lesser charge cannot contain the greater, but the greater may, the lesser. *State v. Hattabough*, 66 Ind. 223.

It would seem that the spirit of the above holdings is, that a man shall not be placed twice in jeopardy for the same act under the same jurisdiction. But it will be observed that in the above cases the offenses which

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spring out of the same act or transaction are of that character that grade or merge one into another, and that the one offense necessarily involves the whole transaction. Thus, in a charge of assault and battery and a charge of riot in which the assault and battery is the riotous act, there is an identity in many respects in the charges as well as in the proof necessary to secure a conviction. The same is true of an affray and of an assault and battery. The *gravamen*, or principal unlawful act in each is the same.

On the other hand there are many adjudications to the effect that if the two offenses growing out of the same transaction are severable and distinct, a judgment rendered on one will not bar a prosecution on the other. A sale of intoxicating liquors is not, *per se*, an unlawful act. It can only be made a crime by force of statute. A sale to a minor and a sale without license although the same sale are, so far as constituting two offenses, entirely distinct. A simple sale without more is not a violation of law. To make it unlawful it must be accompanied by the conditions which the statute requires to constitute the offense. Let it be admitted that the defendant made the sale to William Coberly. These facts standing alone do not constitute a crime. Something more must be charged as well as proved before he can be convicted of a criminal offense. It is not the sale alone that constitutes the offense, but it is the sale, coupled with other facts. In the one, it is the sale coupled with the fact that the vendor had no license. In the other, it is the sale coupled with the fact that it was made to a minor. The sale standing alone is an innocent act. It does not touch the sphere of culpability unless accompanied by other forbidden facts. It is the accompanying facts that make it unlawful. The accompanying fact in each instance is entirely distinct. There is no

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connection between the fact that the vendor had no license, and the fact that the purchaser was a minor. Whilst it is true that there is an identity in the charges and in the evidence up to a certain point, yet up to that point the sale is an innocent transaction. It is only when the criminal character of the transaction is sought to be made that the two offenses diverge, in the charge, and in the evidence necessary to a conviction. The purposes of the two statutes are entirely dissimilar. The one is to raise revenue and protect those who have obtained license. The other is to guard the young against intemperance. The appellee is in error in assuming that the sale alone constitutes the criminal offense. In so far as the charges and the evidence are identical, the transaction is entirely innocent. The appellee might have been convicted, or acquitted of the charge of selling to a minor, and the fact he had no license be not even alluded to. The fact that he had no license was not an element in that offense. So on the other hand he might have been convicted or acquitted of the charge of selling without a license, and the age of the purchaser not have even been referred to, for his age is not an element of that offense.

We are of the opinion that the two offenses are entirely distinct, and that the defendant has not been twice in jeopardy.

The rule is stated in some of the cases to be as follows: The true test to determine whether the plea of former conviction or former acquittal is a good bar, is to decide whether the crimes as charged are so far distinct that the evidence which would sustain the one would not sustain the other. If they are so distinct, there has been no former jeopardy. *Davidson v. State*, 99 Ind. 366; *Smith v. State*, 85 Ind. 553; *State v. Elder*, *supra*; 1 Bishop Crim. Law, sec. 1052.

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This rule, however, has met with criticism. *Blair v. State*, 81 Ga. 629, 7 S. E. 855.

We do not find it necessary to rest our judgment on this latter ground, for the unlawful and culpable facts in each offense are entirely distinct and dissimilar. We cite as supporting our conclusion, *Ruble v. State*, 51 Ark. 170, 10 S. W. 262.

Judgment reversed, with instructions to sustain the demurrer to the plea.

ON PETITION FOR REHEARING.

COMSTOCK, C. J.—In passing upon the petition for rehearing in this case, in view of what is said in the original opinion delivered by Lotz, J., we deem it only necessary to add that, while the provision that no person shall be put in jeopardy twice for the same offense has been incorporated in the constitution of each state of the union, its application and interpretation has not been at all uniform throughout the states. In some instances, in the same state the decisions are confusing.

The expression of the Supreme Court of this State upon the question here involved in *State v. Elder*, 65 Ind. 282, has not been overruled. It was a prosecution for the murder of an unborn child, by the use of means intended to produce a miscarriage. To the indictment the defendant pleaded a special answer of former acquittal. In the opinion, the court deduces three rules from the authorities.

“1. When the facts constitute but one offense, though it may be susceptible of division into parts, as in larceny for stealing several articles of property at the same time, belonging to the same person, a prosecution to final judgment for stealing a part of

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the articles will be a bar to a subsequent prosecution for stealing any other part of the articles, stolen by the same act.

"2. When the facts constitute two or more offenses, wherein the lesser offense is necessarily involved in the greater—as an assault is involved in an assault and battery, or an assault and battery is involved in an assault and battery with intent to commit felony, and as a larceny is involved in a robbery—and when the facts necessary to convict on a second prosecution would necessarily have convicted on the first, then the first prosecution to a final judgment will be a bar to the second.

"3. But when the same facts constitute two or more offenses, wherein the lesser offense is not necessarily involved in the greater, and when the facts necessary to convict on a second prosecution would not necessarily have convicted on the first, then the first prosecution will not be a bar to the second, although the offenses were both committed at the same time and by the same act."

And, speaking by Biddle, J., the court says: "We cannot adopt the rule held in some states, that the accused cannot, in any case, be convicted but once upon the same facts when they constitute different offenses, wherein the lesser offense is not involved in the greater, and when the facts charged in the second prosecution would not convict upon the former."

State v. Elder is cited in numerous cases, among them *DeHaven v. State*, 2 Ind. App. 376; *Smith v. State*, 85 Ind. 553; *Joslyn v. State*, 128 Ind. 160; *Davidson v. State*, 99 Ind. 366.

It is obvious that in the case at bar the proof necessary to convict of the offense charged in the second affidavit would have been wholly insufficient to convict of the offense charged in the first, and under the

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rule laid down in the above cases the judgment of the lower court should be reversed.

The petition for a rehearing is overruled.

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[No. 1,968. Filed May 19, 1897.]

APPEAL AND ERROR.—*Judgment by Default.*—*Sufficiency of Complaint.*—Where the sufficiency of a complaint is questioned for the first time by an assignment of error in the Appellate Court, it can not be available for the reversal of a judgment upon default, unless some fact essential to the existence of the cause of action has been wholly omitted from the complaint. *p. 533.*

SAME.—*Judgment by Default.*—*Presumption on Appeal.*—Where judgment was taken by default it will not be assumed on appeal that anything was proved beyond what was alleged in the complaint. *p. 533.*

PLEADING.—*Failure of Defendant to Demur or Answer.*—Where the defendant fails to demur or answer to a complaint, and judgment is taken by default, such failure is a confession that the complaint is true as to the facts stated. *p. 533.*

BILLS AND NOTES.—*Makers of Promissory Note.*—*Complaint.*—In an action on a promissory note signed in the following order: "Jas. E. Stafford, Pres., J. Zapf, Mgr., Albany Furniture Co.," a complaint alleging that the instrument sued on is the joint note of the parties, and the note filed as an exhibit recites that "we" promise to pay, etc., states a cause of action against Stafford and Zapf, as individuals. *p. 536.*

SAME.—*Promissory Note.*—*Judgment Against Agent of Endorser, When Erroneous.*—Where a note sued on is endorsed "S, by G," and the cause is dismissed as to S, and judgment is taken by default against the makers and "G," the judgment so taken against "G" is erroneous. *p. 537.*

From the Delaware Circuit Court. *Affirmed in part, reversed in part.*

J. W. Ryan and W. A. Thompson, for appellants.

J. F. Meredith and E. E. Meredith, for appellee.

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ROBINSON, J.—Appellee sued appellants upon the following instrument:

“Chicago, Ill., Aug. 15, 1894.

One hundred and eighty days after date, for value received, we promise to pay, at the office of Frank T. Gilpin, Muncie, Indiana, to the order of E. A. Shanklin & Co., the sum of one hundred and fifty dollars, with interest at the rate of — per cent. per annum, payable annually, and attorneys’ fees. The makers and endorsers of this note hereby severally waive presentment for payment, protest and nonpayment, and also waive relief from all valuation and appraisement laws.

JAS. E. STAFFORD, Pres.

J. ZAPF, Mgr.

[Signed]

ALBANY FURNITURE Co.”

The note was endorsed “E. A. Shanklin & Co., per Frank T. Gilpin.”

The complaint alleges: “The plaintiff complains of the defendants and alleges that on the 15th day of August, 1894, the defendants, The Albany Furniture Company, James E. Stafford and Jacob Zapf, by their joint promissory note, a copy of which is filed herewith, marked ‘Exhibit A,’ and made a part of this complaint, promised to pay to the order of,” etc.

The summons issued directed the sheriff to summon “The Albany Furniture Company, James E. Stafford, Jacob Zapf, E. A. Shanklin & Co., and Frank T. Gilpin.” The summons was served on Stafford and Gilpin by reading, on the furniture company “by reading the same to and in the hearing of James E. Stafford, president of said company, and by giving him a true copy of this writ,” and on Jacob Zapf by leaving a copy at his place of residence. None of the defendants appeared, and judgment was rendered in appellee’s favor on default.

Without objection to the proceedings in the trial

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court, appellants question the sufficiency of the complaint.

The error assigned is, that the complaint does not state facts sufficient to constitute a cause of action; and it cannot be available for the reversal of a judgment upon default, unless some fact essential to the existence of the cause of action has been wholly omitted from the complaint. *Laverty v. State, ex rel.*, 109 Ind. 217; *Western Assurance Co. v. Koontz, ante*, 54.

The judgment having been taken by default, we can not assume that anything was proved beyond what is alleged in the complaint. So that the sufficiency of the complaint comes before us exactly as if there had been an unsuccessful demurrer in the court below. *Old v. Mohler*, 122 Ind. 594; *Albany Furniture Co. v. Merchants' Nat. Bank, ante* 93.

The failure of the appellants to demur or answer the complaint was a confession that the complaint was true as to the facts stated. *Fisk v. Baker* 47 Ind. 534.

It is alleged in the complaint that the note sued on is the joint promissory note of the furniture company, Stafford and Zapf, and we must assume that that fact was proven.

The case of *Albany Furniture Co. v. Merchants' Nat. Bank, supra*, cited by counsel for appellee, is not controlling in this case, for the reason that the complaint in that case was essentially different from the complaint in the case at bar.

In *Means v. Swormstedt*, 32 Ind. 87, the note read, "We promise to pay," etc., and was signed "Wm. B. Swormstedt, Sec'y." On the lower left-hand corner of the note was an impression of a seal, embossed upon the paper of the note, bearing the words, "Neal Manufacturing Co., Madison, Ind." In holding this to be

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the note of the corporation only, the court said: "The seal of the company is in the hands of the secretary; it is his duty to affix it to papers executed by the corporation. The presumption is, then, that he did, after signing his name and adding his office, affix the seal of the corporation, which, containing upon its face the proper designation of the corporation, was a signing of their name."

In the case of *Pearse v. Welborn*, 42 Ind. 331, "the makers of the note only added to their names letters which indicated the offices they held, and the characters in which they acted, but in the body of the note the promise is made by them as master, wardens, and trustees of said lodge."

In *Armstrong, Admr., v. Kirkpatrick*, 79 Ind. 527, the note on its face says that it is the note of the Howard County Agricultural Association, and that it executes the note by the directors of the association. In that case the note was held to be the note of the association.

In the case of *Mears v. Graham*, 8 Blackf. 144, the note was: "\$333.15. Ten days after date, we, the trustees of the Methodist E. Church in Rockport, promise to pay to the order of I. and J. Mears three hundred and thirty-three dollars and fifteen cents for value received. Rockport, Ind., July 25, 1842. John W. Graham, Wm. Drum, John E. Cotton, Alexander Britton, Oliver Morgan, Trustees of the M. E. Church." This was held to be the note of the individuals signing it, although the face of the note would seem to indicate that the intention was to bind the church only. See *Jackson School Tp. v. Farlow*, 75 Ind. 118; *Hobbs v. Cowden*, 20 Ind. 310; *Inhabitants of Congressional Tp. No. 11 v. Weir*, 9 Ind. 224; *Prather v. Ross*, 17 Ind. 495.

It has been held in a number of cases in this State,

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that when a note is signed by one or more individual makers, and the signatures followed by the words "trustees of," etc., "president," or "secretary," such words are generally considered as descriptive of the person of the maker, and the note is the obligation of the person or persons so signing it. *McClellan v. Robe*, 93 Ind. 298; *Williams v. Second Nat. Bank*, 83 Ind. 237; *Hayes v. Brubaker*, 65 Ind. 27; *Hayes v. Matthews*, 63 Ind. 412; *Hayes v. Crutcher*, 54 Ind. 260.

In *Heffner v. Brownell*, 75 Ia. 341, 39 N. W. 640, suit was brought on a note in substance as follows: "We promise to pay Daniel Heffner, or bearer, two hundred dollars. * * * *

INDEPENDENCE MFG. CO.
B. S. BROWNELL, Pres.
D. B. SANFORD, Sec'y."

The court held this to be the joint note of the corporation and of the other persons signing it, and that there was no ambiguity appearing upon the face of the note, and that extrinsic evidence was not admissible to show the intention of the parties. See *Matthews & Co. v. Dubuque, etc., Co.*, 87 Ia. 246, 54 N. W. 225; *Lee v. Percival*, 85 Ia. 639, 52 N. W. 543; *Brunswick, etc., Co. v. Boutell*, 45 Minn. 21, 47 N. W. 261.

In the case of *Swarts v. Cohen*, 11 Ind. App. 20, the note read: "* * * we promise to pay to the order of * * *

NATIONAL FORGE & IRON CO.
MARK SWARTS, President."

"We are of the opinion," said the court, "that the note in suit is ambiguous. It was upon that theory that the case proceeded, was tried and determined in the court below. The appellee declared in his complaint, that the appellant executed the note. If John

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Doe should execute his promissory note in the name and style of Richard Roe, he would be liable thereon, and extrinsic evidence would be admissible to show the manner of the execution under proper averments in the pleadings. * * * It is readily conceivable that the note in suit might have been executed by both the corporation and by Swarts, and be their joint obligation. In such a case, affixing the word 'president' to his name does not make it the note of the corporation only, but, under proper averments, it may be shown to be the obligation of the individual as well, and this may be made to appear by extrinsic evidence."

Although the fact is not disclosed by the pleading, it is admitted in the briefs of counsel for appellants and appellee that the Albany Furniture Company is a corporation. It is true the name of the corporation was signed to the note by some officer or agent of the corporation. But the corporate name could not have been signed by both Stafford and Zapf. It might have been signed by neither and still be binding on the corporation. The presumption that would arise where the corporate name is followed by an officer's name that he signed the corporate name, does not arise where the corporate name is followed by the names of two persons. In the very nature of things the name was signed by one person, and we cannot presume that it was one to the exclusion of the other, nor can we, from the face of the instrument, presume that the name was signed by either.

The appellants, Stafford and Zapf, were notified to appear and answer as individuals, and not as officers of the corporation. The cause of action stated was against them as individuals.

Construing the complaint and the exhibit together, we see no ambiguity. It is alleged to be the joint note

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of the parties signing it, and the exhibit is not inconsistent with that allegation. Had there been an appearance and answer, the question of the admissibility of parol evidence might have been presented, but as the record comes to us, it is not necessary to decide anything upon that question.

As the cause was dismissed as to the defendants, E. A. Shanklin & Co., it necessarily follows that the judgment against F. T. Gilpin was erroneous.

Judgment reversed as to the appellant, Gilpin, and affirmed as to the appellants, Stafford and Zapf.

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[No. 2,059. Filed May 19, 1897.]

DRAINAGE.—Action to Enforce Assessment Lien.—Complaint.—In an action, under act of April 6, 1885, to enforce a drainage assessment, a complaint which shows that the petition for the construction of the drain was referred to the drainage commissioners, that they made a report and finding that defendant owned certain lands that would be benefited thereby in certain specified sums, and that the report so made was approved and confirmed by the judgment of the court, sufficiently sets out the assessment to make the complaint good against a demurrer. *pp.* 538–540.

SAME.—Assessment Lien.—Complaint.—In an action to enforce a drainage assessment lien, it is not necessary that it be averred in the complaint that a notice of the assessment of benefits was recorded in the recorder's office. *p.* 542.

SAME.—Assessment Lien.—Complaint.—The complaint in an action to enforce a drainage assessment lien need not aver that the drain was made according to the plans and specifications. *p.* 543.

SAME.—Assessment Lien.—Complaint.—It is not necessary that the complaint, in an action to enforce a drainage assessment lien, aver that all the amount of benefits assessed against defendant's land is needed to pay the expenses and costs of construction. *p.* 544.

From the Marion Circuit Court. *Affirmed.*

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J. H. Blair, for appellant.

A. W. Wishard, F. H. Blackledge and W. W. Thornton, for appellee.

WILEY, J.—On June 11, 1890, George Harness and others filed their petition in the clerk's office of the Marion Circuit Court, for the construction of a ditch. The appellant, whose lands would be affected by the work, was made a party to the proceedings. She did not appear and remonstrate, but suffered a default, and such steps were taken and proceedings had, as that the proposed ditch was ordered to be constructed, and the work of construction was referred to the appellee relator, as one of the drainage commissioners. Appellant's lands were assessed for benefits, and this was a proceeding to enforce the lien of such assessments. The ditch was constructed under the provisions of the drainage act of April 6, 1885. In the proceedings to enforce the lien of the assessments against her lands, judgment was obtained, and a decree entered against appellant for the entire amount of the assessments, etc.

From this judgment she appeals, and the errors assigned call in question the sufficiency of the complaint; the sufficiency of appellant's third, fourth and fifth paragraphs of answer, and the overruling of her motion for a new trial.

Appellant's first contention is that the complaint is defective because a copy of the assessment, which is the basis of the action, is neither set out in the complaint, nor filed with and made a part thereof as an exhibit.

If the assessment is not set out in the body of the complaint, nor made a part of it by reference, as an exhibit, the complaint is ill, and the demurrer thereto should have been sustained. We must look to the

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averments of the complaint to determine this question.

The complaint avers the filing and docketing of the petition, notice to appellant, a reference to the drainage commissioners, and that said commissioners made report thereon. Upon the question of the report of the commissioners and the assessments, the allegations of the complaint are as follows: "Upon the 10th day of June, 1891, said commissioners did, pursuant to law, submit a report of their doings as such commissioners, and that among other things they did report and find that said defendant, Eliza Hoefgen, was the owner of certain real estate therein described as follows:" (Then follows the description of the lands, the first containing 20, the second 40, and the third 40 acres.) Continuing, the complaint avers that "said commissioners did also find that the first of said tracts of real estate owned and possessed by said defendant, Eliza Hoefgen, would be benefited in the sum of one hundred and sixty dollars (\$160.00) by said proposed drainage; that the second tract of land * * * would be benefited in the sum of three hundred and twenty dollars (\$320.00) by said proposed drainage; and that the third tract of land * * * would be benefited in the sum of one hundred and twenty dollars (\$120.00) by said proposed drainage. * * * That afterwards, by proceedings had in this court, said report of said drainage commissioners was by the court duly affirmed and confirmed, and the drainage therein provided, ordered and established and the work therein ordered done, and the lien of the assessments upon the real estate of said Eliza Hoefgen duly established." The complaint then avers that the relator was charged with the construction of said ditch; that he gave notice of the time and place when he would receive bids and proposals for the construc-

tion of said ditch; that the work of construction was let in conformity to law; that the contractors executed bonds conditioned for the faithful performance of their contracts; that said contractors fully completed said work, and that the same was accepted and approved by the county surveyor and said relator. "That by reference thereto the report of the commissioners and the various orders of the court in relation thereto and all of the proceedings had in said cause numbered 5273, of this court, are hereby made a part of this complaint." The complaint further avers that subsequent to his appointment as such commissioner of construction he gave notice by publication, as required by law, of the time and place where the installments of the payments of benefits so assessed would come due and payable, and that he gave actual notice of the time and place where said installments would become due and payable to the appellant; that the work of construction, etc., has long since been completed and has been affirmed and accepted by the county surveyor and the relator, and that a personal demand has been made upon appellant for payment and that the same has been refused. Under these allegations of the complaint, and the adjudicated cases, upon the questions under consideration, we do not think appellant's objection to the complaint is well taken.

In *Laverty v. State, ex rel.*, 109 Ind. 217, it was said by Howk, J., speaking for the court: "In suits for the collection of drainage assessments, * * * all that the complaint * * * need state or show, of or concerning the original proceedings and judgment for the establishment of the ditch, are (1) that some notice was given of the filing of the petition for the ditch, (2) the filing of such petition, (3) the report of the commissioners of drainage of the benefits and damages assessed, and (4) that such report was ap-

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proved and confirmed by the judgment of the court, and (5) a copy of the assessment against the defendant in all cases, must be either set out in, or filed with and made a part of, such complaint."

In *Wishmier v. State, ex rel.*, 110 Ind. 523, it was said: "The assessments, as made and confirmed against the several tracts of land, alleged to belong to the appellant, were literally copied into the body of the complaint. This was all that was necessary in that respect."

In *Louisville, etc., R. W. Co. v. State, ex rel.*, 122 Ind. 443, the complaint showed the filing of a petition; that the railroad company was made a party; that notice was given; that benefits were assessed against its right of way through certain described tracts of land in a specified sum, setting them out; that the assessments so made were duly reported and confirmed by the court, and the complaint was held good.

In the case under consideration, the complaint contained all the averments required when measured and judged by the cases cited. The filing of the petition invoked the jurisdiction of the court as to the subject-matter involved; the notice required by statute, which is averred in the complaint was duly given, brought appellant into court, and conferred jurisdiction of her person; that petition was referred to the drainage commissioners; they made report, finding that the appellant owned certain lands that would be affected by the proposed work, and that they would be benefited thereby in specific sums named, and the report so made was approved and confirmed by the judgment of the court.

The rule prevails in this jurisdiction, that assessments for the construction of public ditches are made in proportion to the assessment of benefits, and while the complaint is not as clear and specific in setting

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out the assessments, as it might be, we think it substantially complies with the statute and the rules of pleading as defined in the cases cited. The allegations of the complaint are sufficient to establish the jurisdiction of the court over the subject-matter, and also over the appellant and her lands to such an extent as to render the assessments good against a collateral attack, and in all particulars above specified, renders the relator's complaint amply sufficient to withstand demurrer for alleged want of facts, and it was good beyond all room for doubt. See *Wishmier v. State, ex rel.*, *supra*; *Pickering v. State*, 106 Ind. 228; *McMullen v. State, ex rel.*, 105 Ind. 334; *Deegan v. State*, 108 Ind. 155; *Laverty v. State, ex rel.*, *supra*; *Louisville, etc., R. W. Co. v. State, ex rel.*, *supra*.

Appellant's next insistence, that the complaint does not aver that the commissioners charged with the work of construction, "made a notice of the assessment of benefits against appellant's lands as confirmed by the court and caused the same to be recorded in the office of the recorder," etc., and that for such failure to so aver, the complaint is defective, is not well taken. No such averment is required, for the lien of the assessment is not created by filing such notice in the recorder's office, but by the judgment of the court approving and confirming the assessment of benefits as reported by the drainage commissioners. *Louisville, etc., R. W. Co. v. State, supra*.

In that case it was said: "It is not necessary, as a condition precedent, to the right of the drainage commissioner to maintain an action for the collection of the assessments, that the percentage of assessments made by the commissioner having the work in charge should have been reported to and confirmed by the court, nor that the commissioner should have filed in the recorder's office of the county notice that the work

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had been established by the court, and of the several assessments against the several tracts of land. * * * The approval and confirmation by the court of the assessments as made in the report of the drainage commissioners, creates the lien which relates to the time of filing the petition."

The next objection appellant urges to the complaint is that it contains no averment that the work has been completed according to the plans and specifications, etc. No authority is cited or argument attempted in support of this proposition. We do not think that such allegation is necessary, for, under the statute, the commissioner may bring his action to enforce the lien, or specific parts thereof as they become due, without reference to whether the work has been completed or not, and appellant admits this. But when the work has been completed, conceding that an allegation that the work has been completed according to the plans and specifications is necessary, we think that the complaint fully complies with such requirement. The complaint does aver: "That the work of the construction of said drain and levees has long since been completed and accepted by the county surveyor and this commissioner." It is further averred that the contract was let to certain contractors, and that "such contractors fully completed the work of the construction of said drainage and levees so let to them." While the complaint does not in direct terms aver that the work was completed according to the plans and specifications, yet, under a liberal construction, which we are required to give to the law under which the proceedings were had, we think the averment is sufficient. The drainage commissioner and county surveyor are public officers, charged with a public duty; and it must be presumed, nothing to the contrary appearing, that they did their duty, and hence

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would not have accepted the work, unless it had been done in conformity to the plans and specifications.

There is no merit in appellant's contention that the complaint does not aver that all the amount of benefits assessed against appellant's lands is needed to pay the expenses and costs of construction. The presumption is, in the absence of any contrary showing, that it is all necessary. It does clearly appear that some of it is at least necessary, and hence, if any sum is due, the complaint would be good as against a demurrer, upon this point. The only remaining alleged error assigned by appellant is the overruling of appellant's motion for a new trial. The first ground assigned for a new trial is that the decision of the court is not sustained by sufficient evidence. The learned counsel for appellant has been unable, in his brief, to convince us that the decision of the court is not sustained by sufficient evidence. Without a detailed discussion of the subject, we have carefully examined and considered the evidence, and we think we can safely say there is evidence in the record which fairly tends to sustain, and does in fact sustain the finding and judgment of the court on every material point, while there is an absolute dearth of evidence in conflict therewith.

The record contains all the proceedings, orders of court, report of commissioners, confirmation and approval of the assessments, notices, contracts, etc., and fully supports the judgment.

Other alleged errors are assigned, but they are waived by a failure to discuss them.

We find no error in the record, for which the judgment should be reversed.

Judgment affirmed.

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RIGNEY v. JACOBS ET AL.

[No. 1,780. Filed November 24, 1896. Rehearing denied May 19, 1897.]

GARNISHMENT.—*Motion to Discharge Garnishee Defendant.*—A motion to dismiss as to garnishee defendant is equivalent to a motion for judgment on the pleadings, and admits all facts pleaded and every legitimate inference to be drawn therefrom; but the facts set out in the motion and in the statement filed in support thereof cannot be considered as true unless such facts had also been set up in the pleadings. *p. 547.*

SAME.—*Assignment of Policy for Collection.*—*Insurance Company as Garnishee.*—The assignment of a fire policy, after loss, the assignment being merely in trust for collection, does not exempt the insurance company from garnishment at the instance of a creditor of the insured. *pp. 548, 549.*

SAME.—*Assignment of Policy to Nonresident, After Service of Writ.*—An insurance company is not entitled to a discharge of garnishment proceedings against it because it appears by the pleadings of the adverse party that another garnishee defendant to whom the claim against the company had been assigned in trust for collection, has sold and delivered the policy to a nonresident of the State. *p. 549.*

From the Elkhart Circuit Court. *Reversed.*

F. E. Baker, C. W. Miller, J. D. Osborne and A. S. Zook, for appellant.

L. W. Vail and E. D. Salsbury, for appellees.

REINHARD, J.—The LaPorte Carriage Company sued the appellee, James H. Jacobs, in the court below, on three bills of exchange, and in attachment, and the other appellees, Henry W. Hixon, the Phoenix Insurance Company of Brooklyn, and the Pennsylvania Insurance Company of Philadelphia, Pennsylvania, were brought in as garnishee defendants. The appellant properly filed under the case of the carriage company. Jacobs was defaulted and judgment was ren-

dered against him in favor of the appellant for the amount of his debt. The carriage company dismissed its garnishment proceedings, leaving the appellant as the only plaintiff.

The insurance companies separately filed answers in six paragraphs, the answers of each company being identical with those of the other. The first paragraph of each of these answers is the general denial, the second and third aver that Jacobs did not comply with the conditions of the policies in making proofs of loss and submitting to an examination under oath; the fourth and fifth paragraphs charge that Jacobs set fire to the insured property and burned it; and in the sixth paragraph it is alleged that after the fire and before the garnishment process was served on the companies, Jacobs had sold his claims against the companies for a valuable consideration.

To the affirmative answers of the companies the appellant replied in one paragraph setting up affirmative matter. The companies demurred to this reply, and the demurrer was overruled. The reply avers, among other things, that the transfer from Jacobs to Hixon mentioned in the sixth paragraph of the answer, was made to Hixon in trust, for the purpose of collecting the money for Jacobs and paying it over to him.

After the case had stood thus for some months, each company filed a separate motion to be dismissed as garnishee defendant. This motion was sustained as to each of the companies, and an exception saved, and the ruling is assigned as error.

Pending the motions of the insurance companies to be discharged, the appellant offered to file additional replies, which motion was overruled and the appellant excepted. The ruling upon this motion constitutes the second specification of error.

After the discharge of the insurance companies as garnishees, the court rendered judgment for costs in favor of said companies, and this action of the court is the third assignment of error.

Did the court commit reversible error in discharging the insurance companies without affording the appellant an opportunity to make proof of their indebtedness to Jacobs?

The practice in filing and sustaining such a motion is an unusual one, but we think it amounts to a motion for judgment on the pleadings, and if upon these the companies were entitled to be discharged, we think the action of the court was proper. If not, it is equally clear, we think, that the court committed an error for which the judgment must be reversed.

The court in passing upon the motion to dismiss could properly look to all the findings filed, and different steps taken in the cause. The motion was in the nature of a demurrer to the evidence. It admitted all the facts pleaded, and every legitimate inference to be drawn therefrom.

We do not think the court could consider as true or admitted any facts alleged in the motion to be discharged, or in the statement in support of the motion, unless such facts had also been set up in the pleadings filed before that motion was presented. The motion was not verified, and, as already intimated, would at best be equivalent only to a motion for judgment on the pleadings. In itself, it furnishes no proof of the truthfulness of its averments.

It appears from the answers of the insurance companies that on the 12th day of October, 1893, Jacobs, "for a valuable consideration," assigned and transferred all his interest in the policies to Hixon, and that Jacobs and Hixon notified the companies of such assignment. It also appears from these answers that

the only supposable indebtedness of the insurance companies to Jacobs was by reason of certain fire insurance policies, but that on these they owed Jacobs nothing, because he had not complied with the terms and conditions of the policies in certain particulars, and because he had willfully and purposely burned the property with intent to defraud the companies. The general denial was not pleaded in reply to the answers.

In the affirmative reply the appellant alleged an adjustment of the loss by the insurance companies, and an agreement by them to pay Jacobs a certain amount. The motion to be discharged admitted an adjustment and agreement to pay. The companies were, therefore, estopped to deny these facts, and were not entitled to be discharged by reason of their averment that Jacobs had violated his part of the contract, etc. In his affirmative reply the appellant further alleges, as we have seen, that although Hixon received the policies by way of assignment, yet that such an assignment was not an absolute one, but was made only in trust and for the purpose of the collection of the debt by Hixon, and the payment of the proceeds to Jacobs. This was a complete traverse of that portion of the affirmative answers as relied upon the transfer of the policy or policies. Nor was it the averment of a mere conclusion. The allegation that the transfer was merely in trust, and for the purpose of collection, was the averment of a fact which was admitted by the motion to dismiss. If it was true that Jacobs transferred to Hixon only for the purpose of having Hixon to collect the debt and to pay it over to Jacobs, and if the companies had not yet paid Jacobs or Hixon, the latter being before the court also, then the appellant was entitled to an order directing the money to be paid to the appellant. Hixon had ac-

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quired no right in the property represented by the policies, except perhaps a special property right in the nature of a lien for his commissions. All the parties being in court the latter could make an order which would protect each of them.

The mere fact that the legal title in the policies had been transferred to Hixon did not necessarily discharge the companies as garnishees. It is true, if they had paid Hixon before process was had upon them, such payment would have been a protection to them. But they make no claim of that sort. They say in effect, "We originally owed Jacobs some insurance, but as he turned the policy over to Hixon for collection, we will settle with Hixon hereafter." This they are not in a position to assert. Hixon, and all parties interested were before the court, and if the facts pleaded in the reply are true, the appellant is entitled to an order for the money to the extent of Jacobs' interest therein, not exceeding the amount of appellant's claim.

Appellees' counsel lay great stress upon an averment in the reply that, "after the service of garnishment on him (Hixon) he (Hixon) had sold said claims and demands against the appellee insurance companies to one F. G. Cowie, a nonresident of the State, and that no property of the said defendant (Jacobs), had been attached, and the only fund to pay said creditors is said claims and demands against said insurance companies, so sold and assigned by said garnishee, Hixon, to said Cowie."

We do not perceive how this averment will exonerate the companies from the payment of the insurance money into court. If Hixon sold and delivered the policies to Cowie after service of the process on him (Hixon), such sale and delivery would constitute no defense on his part. Indeed it does not appear that

he had any power to sell the policies at all, and how he could transfer the title without authority is difficult to understand. But if he had such authority from Jacobs, it ceased after the service of the process upon him. The fact that Cowie has taken the policies out of the State cannot be material. The companies can be fully protected by the order of the court. It does not appear that the companies ever paid this debt to Hixon, or to anyone else. An order upon them to pay it into court for the appellant's benefit could be no injury to the appellees, if they justly owe the debt. If they do not justly owe it, of course they cannot be required to pay it.

Nor do we think the appellant was concluded by the oral examination of Hixon, and of one of the agents of the companies. The appellant had a right to introduce evidence in contradiction of the sworn statements of these persons.

We think the appellant should have been permitted to prove the averments of his complaint, and if then the companies succeeded in establishing the facts alleged in their answers, he should have been given an opportunity to show the truth of his reply. This is true, we think, without reference to the merits of his motion to be permitted to file additional replies.

It is quite true, as contended by the learned counsel for the insurance companies, that the attachment creditors stand in the shoes of Jacobs, and can acquire no greater right than he had at the time the proceedings in garnishment were commenced. But if the averments of the reply are true, Jacobs still has an interest in the property. He had at least an equitable title to the policies, which formed a proper subject for garnishment, if, indeed, Hixon was anything more than a collection agent.

Judgment reversed with instructions to overrule

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the motion of the appellees, The Phoenix Insurance Company of Brooklyn and the Pennsylvania Fire Insurance Company of Philadelphia, Pennsylvania, to be discharged as garnishee defendants, and for further proceedings not inconsistent with this opinion.

KOLB v. RAISOR ET AL.

[No. 2,185. Filed May 20, 1897.]

JUDGMENT.—*Default Set Aside.*—*Defendant's Excusable Neglect.*—*Statute Construed.*—Under section 399, Burns' R. S. 1894, making it obligatory upon the court to relieve a party from a judgment taken against him through his mistake, inadvertence, surprise or excusable neglect, a judgment by default will be set aside where it is shown that although the summons was left at defendant's usual place of residence, he in fact had no notice or knowledge thereof. pp. 555, 556.

EXEMPTION.—*Disposition of Exempt Property Not Fraud.*—A debtor's disposition of property exempt to him as a householder cannot be fraudulent as to his creditors. p. 557.

SAME.—*Exemption Statutes Liberally Construed.*—The constitutional provisions relating to exemptions, and the statutes founded thereon are based upon considerations of public policy and humanity, and are not alone for the benefit of the debtor, but for his family as well, and should be liberally construed. p. 558.

From the Kosciusko Circuit Court. *Affirmed.*

C. D. Sherwin, F. E. Baker and C. W. Miller, for appellant.

J. C. McLaughlin and S. J. North, for appellees.

COMSTOCK, C. J.—This was an action brought by appellant, plaintiff below, against the defendants (appellees) in attachment and garnishment, in the circuit court of Kosciusko county, Indiana, at the September term, 1895. The complaint and affidavit in attachment and garnishment were filed with the clerk of

said court, on the 5th day of August, 1895, and by the clerk a writ of attachment and garnishment were duly issued and placed in the hands of the sheriff of said county for service. The return of the sheriff to the summons on Samuel Raisor is as follows: "Came to hand August 5, 1895. Served this writ by leaving certified copy thereof at the residence of the within named defendant, August 5, 1895. Henry M. Stoner, Sheriff."

By said summons the defendant was notified to appear and answer said complaint and affidavit in attachment and garnishment on the 2d day of the September term of said court. By the record of said court it is shown that said summons and writ was served more than ten days prior to the first day of said term. Afterwards, on the 3d day of September, 1895, the same being the second judicial day of said September term, 1895, of said court, the plaintiff, by his attorneys, appeared, and on the default of said defendant, Samuel Raisor, and upon the answer of the garnishee defendant, the cause was submitted to the court for trial, and the court rendered judgment thereon. Afterwards, to-wit: on the 3d day of December, 1895, the said defendant, Samuel Raisor, filed a written motion to set aside the default and judgment theretofore entered against said Raisor, and Jeremiah Vail, as garnishee defendant.

In his said motion or complaint, appellee did not claim that there was any infirmity in the record of the original judgment. The record was not attacked. He denied the allegations of the fraudulent disposition of his property and money, which was the ground of the attachment and garnishment, alleged that all property and money disposed of by him was used in the legitimate payment of his honest debts; that at the time of the filing of said affidavit in attachment

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he was not about to dispose of any property whatever subject to execution, and that at said time he was and still is a resident householder of the State of Indiana, residing with his wife and children in Kosciusko county, Indiana, and was entitled to an exemption of \$600.00, under the law of the State of Indiana, and that he had, at said time, no property whatever subject to execution; that all his property, real and personal, and choses in action, both within and without the State of Indiana, of every kind and character whatever, held and owned by him and in which he had any interest, was less than \$600.00 in value, and exempt from execution.

Appellant demurred to the motion, for the reason that it did not state facts sufficient to set aside the default and judgment. The court overruled said demurrer, to which appellant excepted. The cause was submitted to the court on motion, pleading and proofs, and a judgment rendered setting aside the judgment theretofore rendered in said cause, to which appellant excepted. Afterwards, to-wit: February 20, 1896, appellant answered by general denial appellee's motion. Appellee demurred to plaintiff's complaint, which demurrer was overruled. Appellee then filed his answer in two paragraphs to the complaint. First, general denial, second, payment. And his answer is in two paragraphs to the affidavit in attachment and garnishment, the first paragraph being a general denial. In the second, appellee avers that he had no property subject to execution at the commencement of the suit; that in January, 1895, he and his brother-in-law, John Bushong, each borrowed from the father of appellee \$500.00 with which they purchased a stock of groceries in the town of Syracuse, Kosciusko county, Indiana; that when he borrowed said money he had no property but some wearing apparel worth

not to exceed \$25.00; that in the middle of July, 1895, appellee sold out his interest in said grocery to Bushong, who agreed to pay all of said firm debts; that July 31, 1895, Bushong sold said grocery to one William Ruple for \$665.00, and turned over to appellee one-half of said amount in payment of his interest; which amount was part in money and part in notes, and all of which appellee turned over to his said father in part payment of his indebtedness to him for said borrowed money; that the note referred to in appellant's affidavit in garnishment and attachment was one of the notes so turned over to his father; that since then he has had no money or property, except what he received for his labor, and which he has expended for the necessary support of his family, and that he claims that all said property was and is exempt from execution, attachment and other legal process.

He files with said answer a schedule of his property.

Appellant moved to strike out the schedule and all answers of appellee, which motion was overruled and said ruling excepted to. The appellant filed a reply. The cause was submitted to the court and a finding made for appellee. Appellant filed a motion in arrest of judgment, which motion was overruled and said ruling excepted to, and judgment rendered in favor of defendant for costs. The appellant then offered to introduce parol evidence upon the motion of defendant to set aside default and judgment, and the court refused to hear said evidence, to which ruling appellant excepted.

The errors assigned are, that the court erred in overruling appellant's demurrer to appellee's motion to set aside the default and judgment; (2) in allowing appellee to file his answer to the original cause of action; (3) in allowing appellee to file his schedule of

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property as against the original cause of action; (4) in not permitting appellant to have his witnesses sworn and to prove by parol that appellee, Raisor, had due and proper notice of the original cause of action as shown by the records in said cause and as read and approved in open court.

In support of the first assignment of error, overruling appellant's demurrer to appellee's motion to set aside default and judgment, appellant calls attention to the fact that it does not assail the record, admits that he lived with his wife and children within the jurisdiction of the court, and that his only purpose was to enable him to claim his exemption, which he waived by not appearing to the attachment and garnishment proceedings, claiming that he left his residence August 5, 1895, the day on which the summons was left at his residence, and went to Fort Wayne, Indiana, a distance of thirty-five miles, and there remained until the 13th of September. Appellant's counsel comments upon the absence of any averment in the motion that appellee was not in direct communication with his wife, or that it was impossible to get any word to him of the proceedings pending against him.

The application was made under section 396, R. S. 1881. It does not call in question the record or acts of the sheriff, but shows that when service was had appellee was absent from home, and did not return until after judgment was rendered against him, and that he had no knowledge from any source whatever of the pendency of the suit. He, therefore, did not have what the law gives to every one against whom legal proceedings are instituted—his day in court. This was not the fault of the sheriff, nor of the manner in which process was served, nor of the return of the officer, nor of any irregularity of the proceedings of

the court, nor infirmity of the record, and the motion is not based upon such theory.

Section 396, R. S. 1881, *supra*, makes it obligatory upon the court to relieve a party from a judgment taken against him through his mistake, inadvertence, surprise or excusable neglect, and supplying an omission in any proceedings on complaint or motion filed within two years.

It is held in *Nietert v. Trentman*, 104 Ind. 390, that while a sheriff's return is conclusive to establish the fact of service so far as to confer jurisdiction of the defendant, yet that, under the statute, for the purpose of rendering an excuse for not appearing and defending the action, the defaulted party may show that the summons was not in fact served upon him, and that hence, he had no knowledge of the action.

The decision is cited and followed in *Shepherd v. Marvel*, 16 Ind. App. 417, a case in all its essential features like *Nietert v. Trentman*, *supra*.

In *Clough v. Moore*, 63 N. H. 111, the court held that upon motion to vacate a judgment by default, the defendant may show that he had no actual notice or knowledge of the suit, although a summons was left at his usual place of abode by the officer, and that fact was stated in the officer's return upon the writ.

We think that the facts averred show excusable neglect. He could not, as claimed by appellant's counsel, have waived his right to an exemption by not appearing to the attachment and garnishment proceedings. He could not be held to have waived, because a waiver implies a knowledge, which he denies having had. See, also, *Zerger v. Flattery*, 83 Ind. 399; *Clandy v. Caldwell*, 106 Ind. 256; *Moon v. Jennings*, 119 Ind. 130.

As to the second assignment of error, the allowance of appellee to file his answer to the original cause of

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action, the substance of which has hereinbefore been stated, appellant claims that said answer alleged that the note garnisheed in the original action was partnership property, and that the said note and all his property was exempt from execution, and as a part of said answer, a schedule of his property and the claim for exemption were filed. Appellant contends that as to the claim that the note was partnership property the court had determined that question in the original cause of action, and the finding was final and conclusive between the parties. Appellant's affidavit contained allegations of fraudulent transfer of property by appellee. The answer of appellee shows that the note was not his property; that one-half of it had been assigned to him in part payment of a debt owing to him by his former partner; that he and his former partner had assigned it in payment of borrowed money, and that the partnership had ceased when he sold out to his former partner, Bushong, who had assumed the payment of the partnership debts. It was proper for appellee to present a schedule of his property to show that it was not subject to execution. Being within the \$600.00 allowed by statute to a resident householder, it was beyond the reach of creditors, and his disposition of it could not be a fraud upon them. *Phenix Ins. Co. v. Fidler*, 133 Ind. 557.

As to the fourth assignment, error of court in not permitting appellant to prove by parol evidence that appellee had due notice of the original cause of action, we deem it necessary only to say, that the first bill of exceptions of appellant sets out the action of the court, and shows an adjudication of the issue on the motion to set aside the default and judgment. The evidence was heard in the form of affidavits introduced by appellant and appellee. After the filing of the affidavits, appellant filed a demurrer to the appel-

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lee's motion, which demurrer the court overruled and sustained the motion to set aside the default and judgment, and rendered judgment to that effect. So that the court passed upon the demurrer before passing upon the evidence.

The constitutional provision relating to exemptions, and statutes founded thereon were designed as a protection to poor and destitute families. They are based upon considerations of public policy and humanity, and are not alone for the benefit of the debtor, but for his family as well. Such statutes should be liberally construed. The record shows the appellee to be entitled to its benefits. *Wilson v. Joseph*, 107 Ind. 490; *Coppage v. Gregg*, 1 Ind. App. 112; *Kestler v. Kerm*, 2 Ind. App. 488; *Eisenhauer v. Dill*, 6 Ind. App. 188; *Green v. Simon*, ante 360.

We find no error. Judgment affirmed.

LOUISVILLE & NASHVILLE RAILROAD COMPANY v.
ESPENSCHIED.

[No. 2,163. Filed May 21, 1897.]

RAILROADS.—*Alighting From Moving Train.*—*Negligence.*—Where a railroad company stops its train at a station for about three minutes, it is not liable to one who went upon the train with his daughters to find seats for them, for an injury caused by his attempting to alight after the train had started, the servants in charge of the train having no knowledge of his intentions. pp. 559-569.

SAME.—*Alighting From a Moving Train.*—*Contributory Negligence.*—In an action against a railroad company for personal injuries sustained by plaintiff while in the act of leaving a train at a passenger station, a special verdict finding that plaintiff was not on the bottom step of the car when the train started, and that the train had moved about six feet and was moving when plaintiff stepped off, and that there was no sudden jerking of the train, shows that plaintiff was guilty of contributory negligence. pp. 569-573.

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From the Posey Circuit Court. *Reversed.*

Alex. Gilchrist and *C. A. De Bruler*, for appellant.

G. V. Menzies, for appellee.

WILEY, J.—The appellant owned and operated a railroad from East St. Louis, Illinois, to Evansville, Indiana, passing through the city of Mount Vernon, in Posey county, Indiana. At the last named place, the appellant maintained a station and platform for receiving and discharging passengers, and for other necessary purposes connected with the operation of its road. On the 15th day of October, 1894, the appellee purchased of the appellant's local station agent, two tickets for his two daughters, between the cities of Mount Vernon and Evansville, and accompanied them to the station at Mount Vernon, for the purpose of assisting them in getting on the train and in securing seats for them. He went into the ladies' car, attached to said train, with his two daughters, carrying some packages for them, but on getting into said car found that it was crowded with passengers, and that there was no place for them to be seated. He then conducted his daughters to the smoking car, and just as he returned from the smoking car onto the platform the train started up and he undertook to get off the train while in motion, and in so doing fell and sustained some injury. The acts of negligence charged against the appellant in the complaint were, that it was a rule and regulation of the company that the train upon which his daughters took passage, after its arrival at said station, was to remain at said station for a period of three minutes; that the conductor of said train knew that the appellee went upon said train for the purpose of assisting his daughters in procuring seats, etc., and that when he started to get off of said

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train the servants of the appellant then in charge of, and operating said train, saw him and knew he was going down the steps of said car for the purpose of leaving the train; that while appellee was descending from the smoking car and was seen by said servants, the train was carelessly and negligently, and without warning to him, started forward before the proper time and while the plaintiff was in the act of stepping from the lower step of said smoking car to the platform of the station; all of which was seen and known by the servants of the appellant; that the servants of appellant then suddenly and carelessly and negligently increased the speed of said train to a high rate, which careless and sudden starting of the train and the sudden and careless increase of its speed threw appellee with great violence on the platform, to his injury, etc.

The complaint further contains the averment that the injury to the appellee was wholly without any fault or negligence on his part.

The case was put at issue by a general denial, tried by a jury, and a special verdict returned. Both appellee and appellant moved the court for a judgment in their favor, respectively. The appellee's motion for judgment was sustained and the appellant's motion overruled, and these rulings of the court are assigned as error.

The facts found and stated in the special verdict, so far as they are material to the decision of the case, are as follows: That there was no regulation or rule of appellant that its passenger train should stop at Mount Vernon for any specified length of time; that at the time stated in the complaint, the train upon which appellee's daughters took passage stopped at said station about three minutes; that after all the passengers had alighted from said train, and after all

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the passengers who desired to take passage on said train had got on at said station, the train remained at said station a very short time while the servants of appellant were engaged in handling baggage; that the conductor had knowledge of the fact that the appellee went upon said train at said station for the purpose of assisting his daughters and securing for them seats; that the appellee did not say anything to the conductor as to whether or not he intended to remain on said train at that time; that before said train started from said station the conductor gave the usual signal to start; that at the time of giving said signal, the conductor was on the station platform between the bay window of the station and the baggage car; that at the time he did not see the appellee; that he had no knowledge that the appellee was about to alight from the train. We quote interrogatory 12 and the answer thereto in full: "12. Did the flagman, engineer, fireman or porter or baggageman upon the defendant's train at the time in question, have any notice or knowledge that the plaintiff was about to alight from said train at the time such train was started; if so, which one of said servants had such notice or knowledge? Answer. The flagman could have seen the plaintiff." The verdict further finds that the train was in motion before the appellee descended the steps of the car, and before he went to step off therefrom; that before appellee alighted from said train, some one called to him and warned him not to get off, but that he did not hear it; that before the appellee attempted to step off the train it had moved about six feet.

As is usual in such cases, two sets or forms of interrogatories were submitted to the jury, and each interrogatory in each separate set was numbered con-

secutively. We have given above, all the material facts in one of the sets or forms of special verdict, and, without aiming to repeat, we now set out such facts in the other set or form as we deem necessary and as are pertinent, as follows:

“3. Was the plaintiff injured by being thrown or jerked off a passenger train of the defendant at Mount Vernon, Indiana, on the 15th day of October, 1894? Ans. His action of stepping, coupled with the motion of the train, caused him to fall.

“20. Did the plaintiff immediately, after seeing his daughters in the smoking car, start to leave the train? Ans. Yes.

“22. Was the train standing still when plaintiff started to leave the train? Ans. Yes.

“23. Was the plaintiff on the bottom step of the smoking car before the train started to move? Ans. No.

“24. Was the train started ahead when plaintiff was on the bottom step of the smoking car? Ans. It started before he was on the bottom step.

“25. Was the train started ahead suddenly while plaintiff was in the act of stepping from the bottom step of the smoking car to the platform of the station? Ans. No.

“26. Did the conductor or brakeman of the train see the plaintiff when he was going down the steps of the smoking car? Ans. The brakeman could have seen him.

“27. Did the conductor or brakeman, while the train was standing still, see the plaintiff on the bottom step of the smoking car? Ans. No.

“28. Was the signal to start the train given when the plaintiff was on the bottom step of the smoking car? Ans. No.

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"31. Was the plaintiff warned that the train was going to start before he started to step from the bottom step of the smoking car to the platform? Ans. Yes, but he did not hear him.

"32. Was plaintiff jerked off the train as he was in the act of stepping from the bottom step of the smoking car to the platform of the station? Ans. His action and the motion of the train caused him to fall.

"34. Did the conductor see the plaintiff when the signal was given to start the train? Ans. No.

"35. Did the brakeman see the plaintiff when the signal was given to start the train? Ans. Yes.

"36. Did the sudden starting of the train when plaintiff was in the act of stepping from the lower step of the smoking car to the platform jerk or throw plaintiff with violence on the platform? Ans. No."

To entitle the plaintiff to recover, it was necessary for him to establish negligence on the part of the appellant as charged in his complaint, and a freedom from fault or negligence on his part. If the facts found by the jury fail to establish either proposition, then it was error for the court to render judgment on the verdict in favor of the appellee.

When the appellee went upon appellant's train under the conditions and circumstances as alleged in the complaint, and shown by the special verdict, the appellant owed him at least the duty of exercising ordinary or reasonable care. As to whether or not he was entitled to the same rights, and the appellant owed him the same duty, as a passenger, under such conditions, there is some conflict in the authorities.

In his work on railroads, Judge Elliott says: "There is some diversity of opinion as to whether one who enters a train for the purpose of assisting a passenger is to be regarded as a passenger and there are cases which seem to hold that such a person is a passenger.

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We are unable to assent to this doctrine as broadly held by some of the cases, for it seems to us that the extraordinary duty of a carrier to a passenger, is not, as a general rule, owing to such a person." Elliott on Railroads, section 1578.

In the case of *Evansville, etc., R. R. Co. v. Athon*, 6 Ind App. 295, it was held, that where a father assisted his invalid daughter on the cars at a station, with the agreement and understanding with the company that the cars would stop long enough to place his daughter thereon and to alight therefrom in safety, the relation of carrier and passenger existed between the company and the father, while the father was assisting his daughter thereon and departing therefrom.

In the case of *Louisville, etc., R. R. Co. v. Crunk*, 119 Ind. 542, it was held that where a passenger was so sick and enfeebled as to make it necessary for assistants to carry him from a station to a seat in the train upon which he had secured passage, the railroad company having contracted to carry him with the knowledge of his condition, is bound to allow him the required assistants, and is under obligation to stop the train long enough to afford the persons aiding such passenger, although their services are voluntarily offered, a reasonable opportunity to leave the train, the same as if they were passengers. It was further held in the case last cited, that where the train was slowly started before such assistants had had a reasonable time to get off, at a rate of speed so slow as to enable them to alight in safety, but after they have reached the platform of the car and while in the act of alighting, the speed is so suddenly and greatly increased through the negligence of the trainmen as to throw him off and injure him, the company was liable.

Conceding, without deciding the question, that appellant owed appellee the same duty that it owed to a

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passenger, under the circumstances and conditions which he entered appellant's train, we are unable to see upon what theory, under the facts found, the appellant can be held liable. The appellant certainly did not owe appellee a higher or greater duty than it did a passenger. It is settled law, by an unbroken line of authorities, that it is the duty of a railroad company, engaged in transporting passengers, to stop its trains at stations or other places where passengers are received and discharged, a sufficient length of time to allow all passengers to alight therefrom, who so desire, or enter therein, in safety.

The law does not contemplate, and it would be unreasonable to hold, that a railway company shall establish or fix any general rule as to the time it will stop its trains for the purpose of discharging and receiving passengers. Such details in the management and running of railway trains must be controlled and adjudged by the conditions, circumstances and surroundings in each particular instance. If there is but one passenger to leave a train, and one to enter it at any particular station, it is evident, that for the protection, care and safety of such two passengers, it would not be necessary to stop such train as long as where there were many passengers to alight therefrom, or to enter therein.

The rule applicable to different conditions has been clearly and fully stated by the Supreme Court of Minnesota as follows: "When the cars stop at a passenger's place of destination, it is his duty to leave the car without unnecessary delay, and the company's to give a reasonable opportunity to do so with safety. The exact length of time to be given must depend very largely upon circumstances. For instance, a longer time would be required when there are many passengers to alight than when there are but few;

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in a dark night, with the landing-place badly lighted, than when there is full light; at a difficult place to alight, than where it is easy." *Keller v. Sioux City, etc., R. R. Co.*, 27 Minn. 178, 6 N. W. 486.

In commenting upon, and approving this rule, the Supreme Court of Wisconsin said: "It would be unreasonable and reckless to hold that the company is required to stop its trains just so long at every depot, and that everybody has the right to depend upon the strict performance of this duty. If the train be behind time, that time must be made up or some collision might occur. The time must depend upon the business it is required to do safely with the persons to whom the company owes any duty. Beyond that there is no reason."

The case from which we have just quoted was where a husband went to the station on a dark morning, about 4 o'clock, to meet his wife. When the train stopped he boarded it to assist his wife in alighting, but he missed her, she going out at another door from where he entered. He passed through one sleeper and was on his way to enter another, when the train suddenly started, and he was injured. There was no showing that his wife needed any assistance, and he boarded the train without the knowledge of any of the trainmen. All the passengers who desired to do so had left the train, and all seeking passage had entered. It was held that he was not a passenger, that under the facts, the company owed him no duty, and that he could not recover. *Griswold v. Chicago, etc., R. W. Co.*, 64 Wis. 652, 26 N. W. 101.

In *Lucas v. New Bedford, etc., R. R. Co.*, 6 Gray, 64, 70, was where an injury occurred after the injured party had assisted an aged and infirm relative to get on board, and it was said by the court: "We think it perfectly clear that Mrs. Lucas, at the time of the in-

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jury, did not sustain such relation to the defendants as imposed on them any extraordinary care; that they were not bound to give her special notice of the time of the departure of the train; and that, if they exercised ordinary care, it was the most the law exacted of them."

These authorities are sufficient to show that it is the duty of the railway company towards those who are on its trains, even by its license, to run the train in the usual, ordinary manner only; and that it owes to such persons no special duty or protection.

Whether the appellee here was a passenger and entitled to the same consideration and protection as a passenger, or a mere licensee, can make no difference, under the facts, as to his right to recover. In either event the appellant was only bound to exercise the care, prudence, and judgment commensurate with its duties and obligations as a common carrier, and its relations to the public and the dispatch of its regular business. There is no obligation, that we are aware of, placed upon the servants of a railroad company, engaged as a common carrier of passengers, to pass through the train of cars to inquire or see if all passengers who desire have left the train at any station; nor is there any obligation resting upon such servants to inquire or see if all persons who happen to be in waiting in or about the station and platform, who desire, have entered such trains. The obligations of the railway company have been fully discharged towards the traveling public when it stops its trains a sufficient and reasonable length of time in which all persons so desiring may leave or enter the train, and provides a safe place for such exit and entry.

It may be remarked that it is also the further duty of the trainmen to call the stations upon their approach, so that passengers may prepare for alighting,

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and upon the train being brought to a stop, it is the duty of passengers to alight or enter with such reasonable dispatch as may be, under the circumstances, consistent with their safety.

The Supreme Court of Iowa, upon this question, says: "The conductor is required, after having, at a proper time, announced the station, to stop the train and hold it such reasonable time as will permit passengers to alight in safety. He is not required * * * 'to know' that all passengers intending to stop at the station have alighted in safety." *Raben v. Central Iowa R. W. Co.*, 73 Ia. 579, 35 N. W. 645.

In *Hurt v. St. Louis, etc., R. W. Co.*, 94 Mo. 255, 7 S. W. 1, 34 Am. and Eng. R. R. Cases, 422, it was said: "When such a reasonable time has thus elapsed, it is no part of the duty of the servants of such corporation to make personal inspection of, or to interrogate the remaining passengers, to see whether they intend leaving the cars. The law imposes no such onerous duty upon a carrier of passengers."

In Mississippi it has been held that it is not the duty of the conductor of a train to see to the debarkation of passengers; but that he should have the stations announced, and stop long enough for passengers to get off. *New Orleans, etc., R. R. Co. v. Statham*, 42 Miss. 607.

This case was cited with approval by the Supreme Court of Georgia, in *Nunn v. Georgia R. R. Co.*, 71 Ga. 710.

In *Culberson v. Chicago, etc., R. W. Co.*, 50 Mo. App. 556, it was said: "If a carrier of passengers by railway stops the train long enough for the passenger, by the use of reasonable expedition, to get off, then there is no cause of complaint."

It is the duty of a company to provide suitable and safe means to passengers for entering and leaving

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cars; that having done this, and having stopped its train in proper position, and for a reasonable time to enable passengers to avail themselves of those means in entering and alighting, it is not bound to render personal assistance nor hold the train until those in charge of it see that all the passengers have in fact alighted. See *Swigert v. Hannibal, etc., R. R. Co.*, 75 Mo. 475; *Carr v. Eel River, etc., R. R. Co.*, 98 Cal. 366, 33 Pac. 213, 21 L. R. A. 351; *Raben v. Cent. Iowa R. W. Co.*, 34 N. W. 621.

In *Falls v. San Francisco, etc., R. R. Co.*, 97 Cal. 114, 31 Pac. 901, it was held that it is the duty of companies to give their passengers a reasonable time and opportunity to approach and leave their trains, and that the duty is reciprocal. Passengers owe it to themselves and to the company to act with reasonable care in alighting from, and boarding trains.

It is also held that it is the duty of passengers, either in boarding or alighting from trains, to use all reasonable dispatch consistent with the surroundings, conditions, and circumstances, and their individual safety.

When we apply these well established rules to the facts in the case here, we are led to the conclusion that the appellee wholly failed to show any liability on the part of the appellant.

The jury found that the train stopped at Mount Vernon about three minutes. Under a strict construction, the court cannot say whether it was less or more than three minutes. In either event, the jury find that the train stopped about as long as appellee charged in his complaint it was required to stop under its rule, and hence he could not have been misled as to the time it actually did stop, or was to stop. The jury further find that there was no rule or regulation requiring the train to stop for any definite period. There is no

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finding how many passengers alighted from the train or how many boarded it on the occasion of the accident. Neither is there any finding that from all the facts within the knowledge of the jury, the time the train did actually stop was a reasonable or unreasonable time.

The case of *Louisville, etc., R. W. Co. v. Costello*, 9 Ind. App. 462, is very similar to the one at bar, except that the appellee in that case was a passenger on appellant's train. His destination was Reynolds, and the train upon which he was a passenger arrived there at night. The jury found that the station was duly announced; that the train stopped from one to three minutes; that other passengers got on and off the train; that appellee, while said train was standing still, carefully and without unreasonable delay, went out on the platform of the car and attempted to get off on the platform at the depot, and that while attempting to get off said train, the servants of appellant suddenly started said train in motion, and by reason thereof appellee was injured, etc. In that case, the court, speaking by Davis, C. J., said: "There is no fact found in relation to the age or physical condition of appellee, or as to what he did or attempted to do, or was prevented from doing, that caused any delay or failure on his part in getting off the train, or that the servants of appellant had any notice or knowledge, when the train was started, that appellee was attempting to get off, or of any other fact or circumstance which required a longer stop than three minutes.

"It was conceded that, on the facts found, different inferences might reasonably be drawn on the question of contributory negligence, but as to this we express no opinion, yet, on these facts so meagerly found as to the circumstances and surroundings of the respective parties in connection with the transaction, we are

of the opinion that the only reasonable inference which can be drawn therefrom is, that appellant was not guilty of negligence in failing to stop longer than three minutes. The court will take judicial notice of the fact that ordinarily a stop of a passenger train for three minutes, at a station for the purpose of allowing passengers to get on or off of the train, is reasonable and adequate. In other words, it is not ordinarily negligence *per se* to fail to stop a passenger train for such purpose for a longer period than three minutes. If any special reason existed in this instance requiring a longer stop, such reason should have been shown. The mere fact that appellee, if in the exercise of due care and reasonable diligence, had not left the train in that time, did not, in itself, make the sudden starting of the train, after a stop of three minutes, a negligent act. If it appeared that appellee was old and feeble, or that appellant's servants knew, when they started the train, that he was attempting to get off, a different question would be presented."

The case from which we have just quoted seems decisive of the case in hand. In the special verdict there is no finding that there was any necessity for appellant to accompany his daughters on the train; that the time the train did stop was unreasonably short for the appellee to have gotten on with his daughters, and off, by the exercise of diligence and dispatch; there is no finding that the conductor or any other servant of appellant knew that he was about to alight from the train when the signal was given to start, while all the other acts of negligence charged are found adversely to the appellee. True, the jury did find that the brakeman saw appellee on the platform of the smoking car just before the train started, but it is not shown that the brakeman knew that he was intending to get off, and, under the rule, the finding must be construed

most strongly against him. The jury found as a fact that the conductor did not know that appellee was about to get off the train, that there was no sudden starting or jerking, but that the movement of the train, coupled with his attempt to step off, was the cause of his falling, etc.

There is nothing in the verdict that appellee was old, infirm, or in any manner crippled, that would prevent him from getting off and on the train quickly or otherwise. We know, as a matter of common experience and knowledge, that in the space of three minutes many passengers can leave a train and many enter it in perfect safety. We also know that three minutes is an unusually long time for a train to stop at an intermediate station to discharge and take on passengers. We further know, by observation and common knowledge, that an ordinary passenger coach is about sixty feet long, and that a person in three minutes, even at a slow gait, could walk at least five times the length of such car. It is the duty of a railroad, as a common carrier, as a matter of safety to its passengers, and for the dispatch of its business, to run its trains as nearly as possible on schedule time, and that it is the duty of its servants to cause its trains to depart from a station upon such schedule time, if it can be done, and especially is this true if, after giving a reasonable and sufficient time for passengers to leave and enter the train, after the leaving time of such train has arrived.

If the rule prevailed for which appellee here contends, a person could enter a passenger train accompanying a friend or relative for the purpose of assisting him or her, and, though the train consisted of half a dozen or more coaches, and he should enter the forward one and finding it crowded could pass on from car to car until the last was reached, and it would be

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the duty of the conductor to hold the train until he would alight. This is not the rule, and should not be, for it would not only infringe upon the rights of the traveling public, but render railroad travel more hazardous by such delays, and interfere materially with the running and operation of trains.

We are unable to say, as a question of law, that the appellant was guilty of actionable negligence, but on the contrary, we think it clearly appears that it was free from any negligence whatever.

In cases of this character the burden is upon the plaintiff to establish his freedom from contributory negligence, and when the special verdict fails to show that fact, the defendant is entitled to judgment. *Standard Oil Co. v. Helmick* (Ind. Sup.), 47 N. E. 14.

The facts found by the special verdict in this case wholly fail to show that the appellee was free from fault or negligence.

The judgment is reversed, with instructions to the court below to render judgment on the special verdict in favor of the appellant.

EAST CHICAGO IRON AND STEEL COMPANY v.
WILLIAMS.

[No. 2,400. Filed May 21, 1897.]

MASTER AND SERVANT.—*Defective Machinery.—Assumption of Risk.*

—If a servant knows of a defect in machinery with which he is working, and notifies the master, and the master expressly or impliedly promises to remedy the defect by making necessary repairs, and the servant relies upon such promises and continues in the service, and within a reasonable time after the promise to repair has been made, is injured, he will not be held to have assumed the risk.
p. 575.

SAME.—*Defective Machinery, When Risk Not Assumed by Employee.—*

If an employe accepts employment where he is to use defective machinery, and the defect is at the time known to the master, and is not disclosed to the employe, and the defect is of such a character

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that it is not open to observation, and could not be discovered by the use of ordinary care, such employe does not assume the risk of the service. *p. 576.*

From the Lake Circuit Court. *Affirmed.*

J. W. Youche, for appellant.

Peter Crumpacker and *J. B. Peterson*, for appellee.

ROBINSON, J.—Appellee seeks to recover damages for injuries caused by appellant's negligence.

Appellant's counsel made application for a supersedeas, and filed a brief upon that application. In that brief some of the errors assigned are briefly discussed, while others are simply mentioned, with the statement that they will be discussed in the regular brief to be thereafter filed. As no regular brief was filed, the alleged errors not argued in the supersedeas brief are deemed waived.

It is argued that neither paragraph of the complaint states facts sufficient to constitute a cause of action.

Appellee was in the employ of appellant, and was engaged in operating certain rolls used for converting pig iron and other iron into what is known as merchant iron. The first paragraph of the complaint proceeds upon the theory that the rolls were worn and out of repair, and the second paragraph, that the rolls were not only worn and out of repair, but that they were negligently constructed and put together.

It is argued that the specific allegations of the first paragraph show that the appellee had notice of the defective condition of the rolls, and that by continuing in the service assumed the risk.

The paragraph shows that the appellant, for thirty days before the accident, knew of the defective condition of the rolls, and that one week before the accident the appellee notified the appellant of their condition,

and threatened to quit work unless they were repaired, and that appellant promised to make the repairs within a reasonable time, and that, relying upon this promise, appellee continued in appellant's employ.

The general rule is, that a servant assumes all the ordinary risks of the service he enters. And it is not enough that a servant, after he learns of the defect, simply notifies the master and continues in the service. But if the servant knows of the defect, and notifies the master, and the master expressly or impliedly promises to remedy the defect by making necessary repairs, and the servant relies upon such promise and continues in the service, and within a reasonable time after the promise to repair has been made is injured, he will not be held to have assumed the risk.

"The employe who continues in the service of his employer after notice of a defect augmenting the danger of the service, assumes the risk as increased by the defect, unless the master expressly or impliedly promises to remedy the defect. The promise of the master is the basis of the exception. If the promise be absent the exception cannot exist." *Indianapolis, etc., R. W. Co. v. Watson*, 114 Ind. 20; *Rogers v. Leyden*, 127 Ind. 50; 3 Elliott, Railroads, section 1296 and cases cited; *Romona Oolitic Stone Co. v. Phillips*, 11 Ind. App. 118; *Indianapolis Union R. W. Co. v. Ott*, 11 Ind. App. 564; *Hough v. Railway Co.*, 100 U. S. 213.

The second paragraph of the complaint proceeds upon the theory that the rolls at which appellee was working when injured were defective, in this: that at the time the rolls were put up the appellant wrongfully, willfully, and negligently put in two rolls for the middle and top rolls that were exactly of the same size; that the injury was caused by reason of this de-

fective construction; that the appellee did not know of the defects in said rolls and the improper construction thereof, and could not know or ascertain the same by an inspection or by observation of said rolls; that the difference in size of rolls could only be ascertained by the use of an instrument for that purpose, which could not be used after the rolls were set up and in position to operate; that it was possible to test them only while they were out of position; that appellant had tested said rolls before putting them in position and knew of their condition and construction.

If an employe, when he accepts employment, knows that he is to work with defective machinery, he assumes the risk of the service. And although he may accept employment where he is to use defective machinery, and the defect is at the time known to the master and is not disclosed to the employe, if the defect is of such a character that it is equally open to the observation of the employe and the master, they will be held to stand on a common footing, and in accepting such employment, the employe assumes the risk. But this rule does not apply where the defect is not open to observation, and where it could not have been discovered by the use of ordinary care.

“It is the theory of the decisions that the servant takes the risk only of what may be denominated ‘seen dangers,’ but by this is understood nothing more than that a servant is entitled, when there is any danger connected with the machinery or employment in which he is engaged, and which ordinary inspection and carefulness on his part will not enable him to avoid, to have it distinctly announced to him. It is meant that, as to such danger, it is particularly the duty of the employer to warn him. He is plainly entitled to have them pointed out when he enters upon the service. When this is done in good faith they be-

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come a part of his contract, but for any failure in this regard, when injury ensues, the master is liable." Beach Contr. Neg., section 359; *Salem Stone, etc., Co. v. Griffin*, 139 Ind. 141.

Appellant's counsel say that the special verdict is insufficient to justify the judgment. The objections to the verdict as stated in appellant's brief are: First, that it fails to show appellant had any knowledge, or was aware of the fact that the rolls complained of were defectively constructed, or out of repair; second, that appellee ever notified appellant prior to his injury that the rolls were out of repair, or that appellant promised to repair them; third, that the verdict shows that the appellee was, at the time of the accident, and had been for six months prior thereto, perfectly acquainted and familiar with the construction and condition of the rolls; and fourth, that the verdict shows that the injury was occasioned by one of the ordinary risks of the employment.

These are the only objections made to the special verdict, and appellant's brief contains only a statement of the objection. The verdict is quite lengthy, and it is not necessary that it be set out in full. That appellant's objections are not well taken is apparent from the following statements in the verdict: "That the said eight-inch mill above described in said defendant's manufacturing plant, were not repaired, nor the edges of said grooves ragged, nor the fillets therein dressed, nor the shoulders on the grooves turned up, for the time aforesaid, and they were by constant use, worn out and beaten down, as above described, became and were for a period of three months before the 31st day of May, 1894, greatly out of repair and more dangerous for the roughers to work with and about.
* * * * That the said roller so put into said mill,

as aforesaid, was turned down and put in by the direction and with the full knowledge of the said John Morgan, and of the said Robert Ross, and the defendant, and the said work in so turning down the said roller and putting it into said mill was done by the employes of defendant in defendant's said manufacturing plant, and the said defendant had full knowledge of the fact of its said defective condition, and of the fact that it was of the same size as the said upper roller. * * * * That during all of said time, from the 1st day of January, 1894, until the 31st day of May, 1894, said defendant, by the exercise of reasonable care and diligence, might have known, and as a matter of fact did know, of the defective condition of said mill, and of the fact that said rollers and the grooves therein were out of repair, as aforesaid. * * * * That the defendant, from December, 1893, all the time to May 31, 1894, had sufficient and ample means of knowing, and might have known, and did know, all said time of the defective and dangerous condition of said mill. * * * * That about one week before said injury, plaintiff complained of the defective condition of said grooves, fillets, and shoulders to defendant, and asked defendant to repair the same, and threatened to and was about to quit defendant's service unless the said rollers were repaired in said respects, and so informed defendant at the time, and defendant, through its officers and agents, said Ross and said Morgan, at said time, promised plaintiff that it would put in new rollers in the place of said worn and defective ones, or would repair the said defective rollers within ten days thereafter. That the said Ross and the said Morgan had the right, at said time and at all times, to make said promise for the defendant and were authorized by it, and were each acting for the defendant in making said promise, and all promises

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made as found herein, and that plaintiff relied on said promise, and by reason of it continued to work for defendant, and in its employment, until his injury complained of. The plaintiff would not have continued in defendant's employ, and would not have continued to work upon and about the said rolls, as aforesaid, and would not have been injured except for the said promise made by the defendant to him, as aforesaid.

* * * * That while it was a fact that the upper and middle rollers were of the same size, yet it was not possible for a person by looking at the said rollers to tell that the upper one was not as large as it should have been, to-wit: One-eighth (1-8) of an inch in diameter larger than the middle rollers. That this fact could be ascertained only by measuring the diameter of the said rollers with an instrument called 'calipers;' that while the said rollers are in their proper position in the mill, it is not possible to measure them without instruments especially made for this purpose. That plaintiff had no such instruments, and did not know and by the exercise of reasonable diligence, could not discover that the rollers were not constructed as they should have been with regard to size. That he had never seen said rollers when they were out of their position in the said mill; that not knowing the condition of said rollers as to size, he was not aware and not informed of the extent of the danger to which he was exposed while so using said mill.

* * * * The said billet, because of the defective condition of the said rollers, and their being of the same size, and because of the defective condition of the grooves in said rollers, and because of the ragging on the grooving having been worn out, and because the fillets were worn out, and the shoulders beaten down and out of repair, and slight grooves thereon, the said billets while intensely hot, and while passing

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through the said roller, curled and wrapped around the upper roller, and while the said roller was revolving, the said billet formed a collar, thereon, and instantly exploded and flew in a great number of small pieces.”

Appellant’s counsel has not argued in the supersedeas brief any of the questions arising on the ruling on the motion for a new trial, but states that these questions are reserved for the general brief. As no general brief has been filed, these questions are not presented under the rules of practice. *Louisville, etc., R. W. Co. v. Miller*, 140 Ind. 685.

Finding no error in the record, the judgment of the circuit court is affirmed.

EIGENMAN ET AL. v. EASTIN, ADMINISTRATRIX.

[No. 2,098. Filed Jan. 15, 1897. Rehearing denied May 21, 1897.]

ACTION.—Dismissal Of.—Payment of Costs Before Bringing Another Action for Same Cause.—Discretion of Court.—Where a cause has been voluntarily dismissed by the plaintiff, and the costs have been awarded against him, and he has brought another action for the same cause, an application of the defendant for a stay of proceedings until the costs so awarded have been paid, or for the dismissal of the second action because of nonpayment of such costs within a limited time, is addressed to the sound discretion of the court. *p. 582.*

SAME.—Dismissal of Action.—When Payment of Costs of Former Action Should be Required Before Proceeding With Second Action.—An application to prevent a party who has voluntarily dismissed his cause of action from proceeding with a second action based upon the same cause unless he pay the costs assessed against him in the former one should not be sustained unless it appears to the court in the exercise of a sound discretion under the facts and circumstances of the particular case, that the second action is without merit, and is vexatious. *p. 582.*

APPEAL AND ERROR.—Evidence.—This court will not pass upon the question as to the weight of the evidence. *p. 584.*

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From the Vanderburgh Superior Court. *Affirmed.*

C. L. Wedding, C. A. De Bruler and Alexander Gilchrist, for appellants.

J. E. Williamson, for appellee.

BLACK, J.—The appellee, on the 10th of October, 1894, brought her action against the appellants, and recovered judgment against them for damages in the sum of \$1,750.00, for causing, through their negligence, the death of her intestate, who was her husband.

The appellants at their first appearance moved that the appellee be required to pay the costs of a former action, and that, on her failure to do so within ten days, the cause be dismissed.

The motion was overruled, and this action of the court is assigned as error.

The motion, which was verified, stated in substance that the plaintiff, in 1894, brought this action in the court below for the same matters and things for which this suit was brought, using the same complaint in each action; that after ample time, proper care and attention to all the matters by counsel and court, the case was brought to trial October 9, 1894; that the defendants incurred extra expense in asking a struck jury; that the case was carefully tried by the plaintiff, and after all her evidence was in, "it being the judgment of the defendant's attorney that upon that evidence there could be no recovery under the law by the plaintiff, declined to offer any evidence, and asked the court to instruct the jury to find a verdict for the defendants;" that after the argument, the court extended the plaintiff further time to make further argument and cite authorities, and also offered to hear any further evidence which might be offered; "and that after all this showing of liberality to the plaintiff, the

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court announced that upon all the points the plaintiff had failed to make any case, and thereupon the plaintiff, after this full and fair treatment, and after she was offered every opportunity to make her case and yet failed," dismissed the case and refiled the same complaint, and a judgment was entered against her for costs, taxed at \$130.30.

The record before us does not contain any counter-affidavit, or indicate that any other evidence was offered by the parties or heard by the court upon the motion.

Where a cause has been voluntarily dismissed by the plaintiff, and the costs have been awarded against him, and he has brought another action for the same cause, an application of the defendant for a stay of proceedings until the costs so awarded have been paid, or for the dismissal of the second action because of nonpayment of such costs within a limited time. is addressed to the sound discretion of the court.

The plaintiff has an absolute right to dismiss.

An application to prevent him from proceeding with the second action unless he pay the costs of the former one should not be sustained, unless it appears to the court in the exercise of a sound discretion under the facts and circumstances of the particular case, that the second action is without merit, and vexatious. *Kitts v. Willson*, 89 Ind. 95; *Harless v. Petty*, 98 Ind. 53; *Sellers v. Myers*, 7 Ind. App. 148.

The rule has been stated in this State to be, "that the second action will be deemed vexatious until the inference shall be removed by a showing on the part of the plaintiff." *Kitts v. Willson*, *supra*; *Harless v. Petty*, *supra*.

In *Sellers v. Myers*, *supra*, it was said by this court, that "the presumption of vexation gives rise only to

the bare probability which fades away before the slightest countervailing evidence.”

Of course, if it should appear from all the evidence before the court that the suit is not vexatious, it would not matter which side produced the evidence. The court's action is open to review upon appeal only for an abuse of sound discretion.

It devolved upon the court to so act as to advance the ends of justice. The plaintiff's complaint presented a meritorious cause of action. It was plainly shown in the verified motion of the defendant that the action of the plaintiff in dismissing the former suit was reasonable and prudent. In the second action, the plaintiff has recovered judgment, whereas it is indicated that she would have failed in the former action. We cannot say that the court, in overruling the motion, was not acting so as to advance what then appeared to be the ends of justice. We cannot determine that in the dismissal of the former suit and the bringing of the action at bar the appellant was vexatiously harassed by a multiplicity of suits, or that the action of the court upon the motion was unjustly injurious to the appellant. It is well settled that there is no available error in overruling a motion which is not well taken as a whole. *Spence v. Board, etc.*, 117 Ind. 573. We cannot say that the court might not properly regard the time limited in the motion as too short. We cannot decide that the court abused its judicial discretion.

The only other matter of dispute between the parties here relates to the question as to the sufficiency of the evidence. It is insisted on behalf of the appellants that the evidence did not sufficiently establish the charge of negligence of the appellants, and that it failed to prove want of contributory negligence on the part of the appellee's intestate.

Eigenman et al. v. Eastin, Administratrix.

The injury which caused the death of her intestate was inflicted while he was engaged at work under the employment of the appellants in a coffer-dam which the appellants were constructing in the building of a bridge over a creek.

The evidence, which is quite voluminous, is rendered somewhat difficult to understand in many of its parts, by reason of the fact that a model of the coffer-dam with the appliances employed in connection with it, was used before the jury, and the references to it by the witnesses, while easily understood by the jury, are so vague that, without a description or a plan in the evidence, the situation of the parties and their conduct are not so clearly presented in this court as would be desirable. It seems to have been intended to supply this want, in part; for it appears, in the course of the introduction of the evidence, that it was agreed "that the diagram contained in Mr. Arnold's deposition shall go into the record, with his explanation of it as contained in the deposition." We are unable to find this diagram or explanation so mentioned anywhere in the record.

Yet we have looked into the evidence in the transcript, and we find it to be conflicting. We cannot decide the matter in dispute between counsel in regard to the evidence without invading the province of the jury, and disregarding the well known rule that this court cannot pass upon the question as to the weight of the evidence.

Judgment affirmed.

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TAYLOR v. LEHMAN.

[No. 1,785. Filed Feb. 16, 1897. Rehearing denied May 26, 1897.]

VERDICT.—Practice.—General and Special Verdict.—Where the jury at the request of one of the parties returns a special verdict, it is the duty of the court to disregard the general verdict returned, where the same is inconsistent with the special verdict. *p. 587.*

LANDLORD AND TENANT.—Repairs.—Measure of Damages.—Where a landlord agrees to make certain repairs and fails to do so, the measure of damages is the difference in the rental value of the premises with the repairs and the rental value without the repairs. *p. 587.*

SAME.—Attorney's Fees.—A provision in a lease for the recovery of attorney's fees in case it becomes necessary to bring an action for the rent does not apply where by reason of a set off or counterclaim there was nothing due the landlord when his action for rent was commenced. *pp. 587, 588.*

SAME.—Promise to Repair.—Consideration.—A promise to repair, made by a landlord to his tenant during the tenancy, and without other consideration than such tenancy, cannot be enforced. *p. 591.*

From the Allen Superior Court. *Reversed.*

E. J. Woodworth, William P. Breen and John Morris, Jr., for appellant.

William J. Vesey and Owen N. Heaton, for appellee.

ROBINSON, J.—This cause was transferred to this court by the Supreme Court.

Appellant sued appellee to recover certain rent alleged to be due for the use of a store building. The appellee answered in seven paragraphs; the first was a general denial; the fourth, payment; and the seventh, a plea of surrender. Demurrers were sustained to the fourth and fifth paragraphs. The second paragraph of answer avers, in substance, that while the appellee was occupying the premises he and the appellant entered into an agreement whereby, in con-

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sideration that the appellee would pay all the cost of enclosing the windows of said building in excess of \$112.50, and would leave these improvements in the building as appellant's property when appellee vacated the premises, appellant agreed that she would pay \$112.50 towards enclosing said windows, and would also repair the cellar; that the windows were enclosed and appellant paid \$112.50 towards the cost thereof, but that she wholly failed and neglected to repair the cellar, and that by reason thereof said premises became damp and foul, and the rental value thereof diminished \$50.00 per month to appellee's damage, a portion of which sum, equal to any amount that might be found due appellant, he asked to be set off against the same, and that he have judgment for the balance. The sixth paragraph of answer is like the second, except it is alleged that the cellar was to be repaired within a reasonable time, which was three months. The case was put at issue by replies to appellee's affirmative pleadings, and at appellant's request the jury made a special finding of the facts. A motion by appellant to send the jury back to their room to make a proper finding of the facts was overruled, as were also appellant's motions for a *venire de novo*, for a new trial, and for judgment on the special verdict. A remittitur by appellee of \$140.00 was entered, and judgment then rendered in his favor for \$127.50.

The first assignment of error discussed by appellant's counsel is the overruling of the motion for a *venire de novo*.

By the special verdict the jury found that the defendant should have damages in the sum of \$267.50, if the law was with him; and then by a general verdict the jury found for the defendant, and assessed his damages at \$190.00.

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When the special verdict was demanded by the appellant neither the court nor the jury could disregard it. The jury exhausted its power in the case when it returned the special verdict demanded, and it was not only within the power, but it was the duty of the court to disregard the general verdict. *Todd v. Fenton*, 66 Ind. 25; *Louisville, etc., R. W. Co. v. Balch*, 105 Ind. 93.

The jury had found that the appellant had agreed to repair the cellar, and that it had not in fact been repaired, and that during the time appellee occupied the premises after that agreement was made, the rental value of the building was \$80.00 per month, and if the repairs had been made the rental value would be \$100.00 per month.

If there was, in fact, an agreement to repair the cellar, then the measure of damages would be the difference between the rental value of the premises with the repairs and the rental value without the repairs. The jury found that the agreement to repair the cellar was made on the — day of March, 1893, and that the repairs were to be made at once. The new year of the tenancy begun on April 1, following the date of the agreement, and from the facts found the building was worth \$20.00 per month less for the time appellee occupied the building until he moved out, or a total of \$380.00. The jury further found that the rent for November, 1894, if due, was \$112.50, and that it had not been paid. The difference between these amounts is the amount named by the jury in the special verdict.

The jury further found that "the value of the attorney fees for plaintiff in prosecuting this cause is \$75.00," and this finding is within the terms of the lease, which was filed with the complaint as an exhibit, and it is contended by appellant's counsel that the attorney fee and the month's rent, with interest,

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should have been added together and the sum taken from the \$380.00.

Construing the finding as a whole, its effect is, that when appellant filed her complaint there was nothing due her from the appellee. There being nothing due for rent which appellant could recover in an action against the appellee, no attorney fee could be allowed. The same would be true of interest.

In the case of *Dawson v. Shirk*, 102 Ind. 184, Mitchell, J., said: "Where a special verdict or special finding of facts is returned, nothing remains for the consideration of the court except to render the proper judgment on the facts found according to the law, and when the jury assess the amount of the recovery, the data furnished and facts found must be so inconsistent with the amount assessed as that the two cannot be reconciled in order to justify the court in disregarding the assessment."

We think the finding of the jury is sufficiently definite and certain to enable the assessment of the proper amount of damages sustained by the appellee. It can not be said that the filing of a remittitur by the appellee was an admission that the damages were not correctly assessed. There is no reason why appellee was not entitled to damages for the whole nineteen months, if he was entitled to damages for the year.

The first reason assigned for a new trial is, that the special verdict of the jury is not sustained by sufficient evidence. It is contended that there is no evidence to support the finding of the jury that in March, 1893, the appellant entered into a contract with appellee whereby appellant agreed to repair the cellar and pay \$112.50 towards the cost of enclosing the windows, if appellee would pay so much of the cost of enclosing the windows as exceeded \$112.50.

The duty of appellant to repair did not arise out of

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the relation of landlord and tenant, and there is no covenant in the lease to make repairs. If there was an agreement by appellant to repair the cellar it must be supported by a new and different consideration from that provided in the lease.

“A promise to repair, made after the lease is entered into, is a mere *nudum pactum*, and no liability exists for a failure on his [the landlord's] part to make such repairs.” *Purcell v. English*, 86 Ind. 34, and cases cited; *Harry v. Harry*, 127 Ind. 91; *Mull v. Graham*, 7 Ind. App. 561; *Mattler v. Strangmeier*, 1 Ind. App. 556.

We think it is evident that if there was any consideration for the agreement to repair the cellar, it was outside of the agreement to enclose the windows, for in all the conversations concerning the repairing of the cellar the appellee said the cellar must be repaired or he would not occupy the building any longer. The appellee says they agreed about enclosing the windows, and then, in the same conversation, “he [Mr. Taylor] says, ‘we will do something for the cellar, we will cement or gravel it; I will send some one here to see about it,’ and I says, something will have to be done with it or I cannot continue to occupy the building.” Again the witness says: “Mr. Taylor said, after we came to an understanding about the windows, he said, ‘the building is costing me more than the rent we are getting justifies,’ and he says, ‘we will have to do something with the cellar, cement or gravel it.’ I said, you will have to do something or we cannot remain in the building. He said, ‘I will send some one up to see about it.’” On cross-examination the witness testified to substantially the same thing, that if the cellar was not fixed he could not continue as a tenant of the building, and that Taylor said he would send some one up to see which was best, cement or gravel. The wit-

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ness, Deshour, testified, "they were speaking about fixing up the cellar with the rest, and Mr. Taylor said he would attend to it; something had to be done, either had to be cemented or sand put in it, something had to be fixed up; he said he would send a man around to look after it. He [appellee] said it ought to be done or he could not stay in the building. He [Taylor] said he would see it was done, he would send a man around to look after it, something would have to be done, either cement or gravel it, or something."

The agreement to enclose the windows was entirely separate from the contract of tenancy. Neither of the parties was under any obligation to enclose the windows. That agreement was complete in itself, and was carried out by both parties. Nowhere does the appellee say that he will not pay his agreed part on the windows if the cellar is not repaired, but in every instance he says if the cellar is not repaired he will not continue to occupy the building.

It is true, the conversation about the windows and the cellar was all one conversation, but it appears from appellee's evidence that the alleged promise to repair the cellar was "after we had come to an understanding about the windows." When this conversation took place his tenancy would expire in less than one month. He could vacate the premises at that time and nothing he said in that conversation would bind him to keep the building another year, whether the cellar was repaired or not. Even if there was a promise on Taylor's part to repair the cellar, there was no agreement on appellee's part to keep the premises, nor was there any promise on appellee's part to do anything in consideration that the repairs should be made.

We think there was some evidence to show that appellant did promise to repair the cellar, but there is

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no evidence of any consideration for such a promise, and the belief that there was no consideration for such a promise is strengthened by the conduct of the appellee in paying the stipulated rent each month for the nineteen following months.

A promise to repair made by a landlord to his tenant, during the tenancy, and without other consideration than such tenancy, cannot be enforced.

For the above reasons we think the court erred in overruling appellant's motion for a new trial.

Judgment reversed, with instructions to sustain appellant's motion for a new trial.

ON PETITION FOR REHEARING.

ROBINSON, J.—We have carefully considered the reasons urged by appellee for a rehearing of this appeal, but are still of the opinion that a correct conclusion was reached on the former hearing. The only question presented in the petition is the construction placed upon the evidence as to certain repairs. This question was fully argued in the original briefs, and was decided on the former hearing. The agreement to repair the windows was carried out, as shown by the evidence, but there is nothing in the evidence as to how long the tenant would continue to occupy the premises, or that he would continue to occupy them at all after the close of that year.

The tenancy would expire in less than a month when the conversation between the parties was had, and the subject-matter of that conversation may have been a tenancy for one year, or for six months. the evidence does not disclose. It is shown that the windows were repaired and that the cellar was never repaired, and it also appears that the tenancy did continue for one year and for seven months of another year. As

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we said in the original opinion, the subsequent conduct of the parties strengthens the belief that if there was an agreement reached as to the continuation of the tenancy it was done without reference to the repairs of the cellar.

Petition overruled.

THE UNION CENTRAL LIFE INSURANCE COMPANY
v. JONES.

[No. 2,103. Filed May 26, 1897.]

INSURANCE.—*Contract.—Forfeiture.*—The conditions of a policy upon which it is sought to base a forfeiture will be construed most strongly against the insurance company, and a forfeiture will not be enforced unless its enforcement is clearly demanded by the established rules for the construction of written contracts. *p. 598.*

SAME.—*Policy Susceptible of Two Interpretations.*—Where a policy is susceptible of two interpretations, the one giving greater indemnity and sustaining the claim, will be adopted by the court. *p. 600.*

SAME.—*Policy with Inconsistent Provisions.*—Where a policy contains inconsistent provisions, that which is most favorable to the insured will be adopted. *p. 600.*

SAME.—*Forfeiture.—Pleading.—Answer.*—In an action on an insurance policy, where the company claims a forfeiture, it is not necessary that the complaint aver that the company had not pursued the proper method for the forfeiture of the policy. It devolved upon the company to show by affirmative answer that it had done so. *pp. 601, 602.*

SAME.—*Forfeiture.—Waiver.*—Under a policy of insurance giving the company the election to cancel the policy upon the insured's failure to pay any premium note at maturity, and providing that upon cancellation all premium notes not then due shall be surrendered to insured, the company waives the forfeiture by treating the policy as still in force, notwithstanding a cancellation on its books, and enforcing collection of notes not due at the time of such cancellation. *p. 602.*

From the Delaware Circuit Court. *Affirmed.*

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Ramsey, Maxwell & Ramsey, E. E. Botkin and E. E. Sluss, for appellant.

Rollin Warner and A. W. Brady, for appellee.

BLACK, J.—The appellee, Julia R. Jones, sued the appellant upon a policy of insurance issued by the appellant upon the life of Melvin L. Jones. A demurrer to the complaint for want of sufficient facts was overruled, and a demurrer to the appellant's answer was sustained. These rulings are presented for our consideration.

The complaint showed the issuing of the policy on the 17th of March, 1890, to said Melvin L. Jones, who then and thereafter, until his death, on the 2d of December, 1894, was the appellee's husband. By the terms of the policy set forth in the complaint, in consideration of the statements of the application for the policy and of the present payment of the sum of \$333.10 at the home office of the company, as thereafter described, and of the annual payment of \$66.62, commencing on the 30th of December, 1894, and continuing thereafter during the term of ten years, and of the payment when due of any and all notes given for premiums or parts of same, the appellant insured the life of said Melvin L. Jones in the sum \$1,200.00 for fifteen years, ending December 30, 1904, the appellant agreeing to pay that sum to him at that date, or in the event of his death before that date, to the appellee.

The premiums for the first five years were in the policy acknowledged to have been paid by \$66.62 cash, and four notes for \$66.62 each, payable respectively on the 30th of December, 1890, 1891, 1892, and 1893.

It was alleged in the complaint that said Melvin L. Jones performed all the stipulations and conditions on his part contained in said policy, and violated none

of the agreements or conditions thereof, except as hereinafter shown; that at the time of making the contract he paid the appellant \$333.10, as follows: He paid the cash payment referred to in the policy in the sum of \$66.62, and executed to the appellant his four several promissory notes, each for \$66.62, payable respectively December 30, 1890, 1891, 1892, and 1893, providing for eight per cent. interest after maturity and attorneys' fees. He paid in full said notes falling due December 30, 1890, and December 30, 1891, respectively, but failed and neglected to pay the notes falling due December 30, 1892, and December 30, 1893, respectively.

It was alleged that at the time of making the contract he borrowed from the appellant \$1,200.00, and that he executed to the appellant, to evidence this loan, his promissory note for that sum, payable five years thereafter, and for the interest thereon six coupon notes, one for \$66.04, four for \$84.00 each, and one for \$17.96, payable, respectively, on the 1st of January, 1891, 1892, 1893, 1894, 1895, and March 17, 1895, all of said notes providing for eight per cent. interest after maturity and attorney's fees at the rate of five per cent.; that to secure said note of \$1,200.00, and said six coupon interest notes, and said four premium notes of \$66.62 each, said Melvin L. Jones and the appellee, on said 17th of March, 1890, executed to the appellant a mortgage on certain real estate described, in Delaware county, Indiana; that the mortgage provided that upon a failure to pay any of said coupon interest notes when due, the principal note for \$1,200.00 should also, at the option of the appellant, become due and payable; that all of said notes, including said premium notes, were executed by the appellee as well as by said Melvin L. Jones, and were payable at a bank named in this State, and waived relief from

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valuation and appraisement laws; that on the 5th of February, 1894, said Melvin L. Jones and the appellee executed to one Jacob Erther a deed for said real estate, and said Jacob Erther, then, as consideration for said real estate and deed, agreed with said Melvin L. Jones, by a contract in writing, among other things, to pay the amount of said indebtedness secured by said mortgage to appellant; that said Melvin L. Jones and the appellee and said Jacob Erther failed and neglected to pay said three notes of \$84.00 each, payable January 1, 1893, 1894, and 1895, respectively, and said note for \$17.96, payable March 17, 1895, and said principal note of \$1,200.00, and said two premium notes for \$66.62 each, payable respectively December 30, 1892 and 1893; that on the 18th of December, 1894, the appellant as plaintiff, with full knowledge of the death of said Melvin L. Jones, commenced an action against said Jacob Erther as sole defendant in the court below, and in its complaint therein, as its sole cause of action, set out and pleaded all of said unpaid notes, including said two unpaid premium notes, and said mortgage and said written contract whereby said Jacob Erther agreed to pay said indebtedness secured by said mortgage, and asked for a judgment against said Jacob Erther for the amount of all said unpaid notes, including interest and attorney's fees, and for the foreclosure of said mortgage against said real estate; that said Jacob Erther appeared in said court in said action, and on the 8th of January, 1895, filed his answer to said complaint, denying all the allegations thereof and averring that said written contract whereby he assumed said indebtedness was executed wholly without any consideration; that upon the issue thus formed a trial was had on, etc. The complaint shows a finding and judgment in said action in favor of the appellant against said Jacob Erther per-

sonally for the recovery from him of \$1,700.49, without relief from valuation or appraisement laws, and for the foreclosure of said mortgage, and the sale of said real estate to satisfy said judgment, with judgment over against said Erther; that said amount of said judgment included all of said unpaid notes, including the principal of said two unpaid premium notes and all interest and attorney's fees thereon.

The complaint shows in detail the sale of said real estate on the 27th of July, 1895, by the sheriff, under said judgment, to the plaintiff for the full amount of the judgment and interest and costs, and the issuing to the appellant of the sheriff's certificate of such sale, which the appellant still held; and it was alleged that the appellant at the same time received from the sheriff in full satisfaction of said judgment a sum stated, being the full amount due and unpaid on said judgment, including six per cent. interest from its rendition, and the appellant executed to the sheriff its receipt for said sum in full satisfaction of said judgment, and the sheriff made his return, etc. It was alleged that by said purchase said judgment and said two unpaid premium notes were wholly paid and satisfied; that by the taking of said judgment and said purchase of said real estate and the satisfaction of said judgment, the appellant waived the forfeiture of said policy because of said failure to pay said two premium notes.

The complaint contains much other matter which need not be set forth to illustrate the question in dispute on appeal.

In the policy set out in the complaint is the following provision relating to said four premium notes: "Failure to pay any one of said notes at maturity will give the company the right, at its election, to avoid this policy, with all its provisions, and the note or

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notes past due at the date of the exercise of the election to cancel the policy will be payable, with interest to date of payment, as premium for the period of actual insurance up to the date of cancellation upon the books of the company, and the remaining notes, if any, will thereupon, on surrender of the policy, be surrendered to the maker."

Upon the back of the policy were certain conditions which were referred to in the policy as part thereof. In the first clause of these conditions it was provided, that "all premiums, or notes, or interest upon notes, given the company for premiums, shall be paid on or before the days upon which they become due, at the company's office in the city of Cincinnati, or to the authorized agent of the company, he producing a receipt therefor signed by the president, vice president or secretary."

In the sixth clause it was provided, that "upon the violation of any of the foregoing conditions, this policy shall be null and void, without action on the part of the company or notice to the insured or beneficiary, and all payments made thereon, and all accrued surplus of profits shall be forfeited to the company," etc.

The answer alleged, in substance, that on the 30th of December, 1892, said policy by its terms set out in condition No. 1, became null and void, by reason of the failure to pay the premium note due on that date; that said premium notes due on December 30, 1892 and 1893, both contained a condition as follows: "If this note, or any installment of interest, be not paid at maturity, said policy, with all conditions for surrender or continuance as a paid-up term policy, shall, at the option of said company, without notice to any interested party, be null and void, and said premium and accrued interest shall, without rebate or discount and without reviving said policy or any of its provisions,

be collectible without relief from valuation or appraisal laws." It was further alleged, that upon the maturity of said note due December 30, 1892, the appellant exercised the option above set out, and duly canceled said policy on its books, and thereafter, during the month of January, 1894, it duly notified the assured that said policy had been canceled and declared void, etc.

We may consider together the questions presented by both the complaint and the answer, assuming without deciding, that the condition quoted in the answer as part of each of the premium notes may be thus pleaded without setting forth the notes themselves or copies thereof.

Forfeitures are not favored by the courts. They will not declare them except in very clear cases. The conditions of the contract upon which it is sought to base a forfeiture must be strictly complied with by the insurance company. Such conditions will be construed most strongly against the company, and a forfeiture will not be enforced unless its enforcement is clearly demanded by the established rules for the construction of written contracts.

In *Masonic, etc., Assn. v. Beck*, 77 Ind. 203, 40 Am. Rep. 295, it was held that a distinct affirmance of the contract by the party entitled to avoid it, made with knowledge of the facts, and especially such acts as the demand and receipt of premiums or assessments, would constitute a waiver of the forfeiture or the right to annul the contract; also, that there is no reason why this waiver may not occur after, as well as before the death of the person whose life was insured. See, also, *Repogle, v. American Ins. Co.*, 132 Ind. 360; *Marshall Farmers' etc., Co., v. Liggett*, 16 Ind. App. 598.

In *American Ins. Co. v. Henley*, 60 Ind. 515, where the policy was voidable at the option of the company.

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during the continuance of a default of the assured in making payment of an installment of the premium note, it was said, that if the company collected the note by suit the liability of the company on the policy would be renewed.

In *Continental Ins. Co. v. Chew*, 11 Ind. App. 330, where the action was upon a policy of fire insurance, which provided that the company should not be liable for any loss occurring while any part of the premium was overdue and unpaid, the court said: "Although the company has a right to rely upon such default by the insured as a defense, if it, with knowledge of a loss, accepts the premium, it thereby waives the forfeiture and restores the policy to its full force and effect. Such acceptance does not simply revive the policy as to the future, but it thereby restores to it its power and force from the beginning."

In discussing a clause in a policy which provided for the suspension of the insurance upon failure to pay a premium note at maturity, the court said, that "This case differs widely from one in which the failure to pay at maturity works an absolute forfeiture of the policy. There the acceptance of the premium after forfeiture is inconsistent with the terms of the policy, and therefore it is properly held that such acceptance is a waiver of the forfeiture." *Curtin v. Phenix Ins. Co.*, 78 Cal. 619, 21 Pac. 370. See, also, *Mobile Life Ins. Co. v. Pruett*, 74 Ala. 487.

In *Union Cent. Life Ins Co. v. Woods*, 11 Ind. App. 335, the premium note, for the non-payment of which forfeiture was claimed, had been merged into a judgment taken by the company against the insured, and before he died more than enough of the judgment to cover such note was made out of his property which had been mortgaged to secure it and other notes. The policy provided for a forfeiture upon failure to pay

premiums when due, and that default in the payment of a premium note should entitle the company to treat the premium as earned; also, that upon failure of the insured to comply with any condition in the policy, the same was to become null and void without any action on the part of the company or notice to the insured or beneficiary. It was said by the court, that the failure to declare a forfeiture was not a waiver, but that a waiver may be manifested by conduct as well as by words of the insurer; and the enforced collection of the premium after forfeiture, or what might have been a forfeiture, constituted a waiver; and that this was true notwithstanding any provision in the policy that the premium thus collected should be considered as premium earned. See, also, *Michigan, etc., Ins. Co. v. Custer*, 128 Ind. 25; *Phenix Ins. Co. v. Tomlinson*, 125 Ind. 84.

Counsel for appellant suppose the question of forfeiture to have been passed upon without much deliberation in *Union Cent. Life Ins. Co. v. Woods, supra*. In the view which we take of the case at bar, it does not require that we should decide whether the court, in the case last mentioned, in the language employed, relating to a policy which provides that the premium collected by suit shall be considered as premium earned, states the rule too broadly.

Where the language of the policy is susceptible of two interpretations, the one giving greater indemnity and sustaining the claim will be adopted by the court. *Union Cent. Life Ins. Co. v. Woods, supra*.

Where a policy contains inconsistent provisions, that which is most favorable to the assured will be adopted. *Northwestern, etc., Ins. Co. v. Hazelett*, 105 Ind. 212.

In the case last cited, in one clause of the printed conditions of the policy, intemperance to the degree of

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impairment of health or of inducing delirium tremens worked an absolute forfeiture. In another clause the result of the same conditions was that the company might cancel the policy and thereby absolve itself from liability except for the surrender value. It was held that the provision most favorable to the assured should be adopted, and that an answer of the insurance company setting up the intemperance of the assured, which did not aver that it had absolved itself from liability by canceling the policy, was bad on demurrer.

In the case at bar, the policy and the premium notes constituted parts of one contract. The various conditions relating to non-payment of the notes were not consistent with each other. The condition most favorable to the insured was that upon the face of the policy, which gave the company the right, at its election, upon failure to pay a note at maturity, to avoid the policy, and which provided that when it should exercise the election to cancel the policy the note or notes then past due should be payable as premium up to date of cancellation on the books of the company, while the remaining notes, if any, should thereupon be surrendered to the maker, on surrender of the policy.

The appellant was bound strictly by this condition. It could not avoid the policy because of the non-payment of any note or notes at maturity, except by pursuing the method thus provided by itself in the policy.

In order to defeat an action upon a policy of insurance on the ground that the policy has been canceled, it must be shown either that the conditions upon which the company was allowed to cancel the policy were strictly complied with, or that the assured, knowing all the facts, waived such compliance. *Quong Tue Sing v. Anglo-Nevada Assur. Corp.*, 86 Cal. 566, 25 Pac. 58, 10 L. R. A. 144.

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It was for the company to show that it had pursued the proper method for the forfeiture of the policy, and it did not devolve upon the appellee to show in her complaint that the company had not done so.

The answer says that upon maturity of the note due December 30, 1892, the company canceled the policy upon its books, and that in January, 1894, it notified the assured that said policy had been canceled and declared void.

Giving the provisions of the contract full effect, the company would not have the right, after cancellation of the policy at maturity of the third note, to collect any unpaid premium except that represented by the third note. If by such cancellation the policy became forfeited and thenceforward null, of course the company would not have the right to collect the fourth note, which was then not due.

There was but one way in which the policy could be forfeited for non-payment of any note. To do so, it was necessary for the company to exercise its election to cancel the policy. The policy never was forfeited in the manner prescribed for non-payment of any note except the third.

After pursuing the *ex parte* method of cancellation for non-payment of the third note, as shown by the answer, the company, without taking any like measures with reference to the fourth note, enforced the full payment of both the third and fourth notes, as shown by the complaint. It treated its own action with reference to the third note as ineffectual for the cancellation or annulment of the policy.

It had no right, by the terms of the contract, to collect the fourth note, unless there was an exercise of the right to elect to cancel the policy after the maturity of that note.

By enforcing collection, as it did through its fore-

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closure proceedings, it ignored the only cancellation upon its books, and waived the forfeiture of the policy for non-payment of the two premium notes so collected. It cannot be expected that the court should treat the cancellation as effectual which was thus treated by the insurer. The policy was not rendered absolutely void by the non-payment of the premium notes at maturity. The policy, according to its terms, was voidable only, and that, too, by the exercise of the election to cancel it upon the books of the company. The provision which gave the company that right contemplated that any premium notes not then due should not be collectible. The company, instead of pursuing the method of forfeiture prescribed strictly, as it was bound to do, treated the policy as still in force, notwithstanding the cancellation on the books.

We are unable to find error in the rulings on the demurrers. The judgment is affirmed.

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[No. 2,180. Filed May 26, 1897.]

TOWNS.—*Defective Streets.—Liability for Damages by Reason Thereof.*

—An incorporated town has exclusive power over its streets, and is under duty to use ordinary care to keep them in a reasonably safe condition for travelers thereon, exercising ordinary care, and in default thereof is liable in damages for injuries thereby sustained.

p. 604.

APPEAL AND ERROR.—*Longhand Manuscript of Evidence.—How Made Part of Record.*—The longhand manuscript of the evidence must be filed in the clerk's office before it is incorporated in the bill of exceptions. *p. 605.*

From the Greene Circuit Court. *Affirmed.*

H. C. Shaw and Davis & Moffett, for appellant.

Emerson Short, for appellee.

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BLACK, J.—The appellant has assigned as error the overruling of its demurrer for want of sufficient facts to the appellee's complaint.

The action was one for the recovery of damages for personal injury to the appellee, received without his fault while he was traveling upon a public street of the town, and caused by a defective condition of the street, attributed to the negligence of the appellant.

Counsel for the appellant in argument have referred to a recent case in our Supreme Court, *Board, etc., v. Allman, Admr.*, 142 Ind. 573, in which it is decided that there is no liability of counties in this State to answer in damages for injuries sustained through defects of bridges over watercourses, the decision being based upon the ground, that counties, being sub-divisions of the State, are instrumentalities of government and exercise authority given by the State, and are not liable for the negligence of their officers, unless a right of action is expressly given by statute.

Counsel for appellant say, they fail to see why the same reason will not apply to towns, and therefore they contend that the same rule of non-liability should be applied to towns in respect to their streets.

A careful examination of the case mentioned could not have led counsel to such a conclusion, and they do not support their contention with any authority.

An incorporated town has exclusive power over its streets, and is under the duty to use ordinary care to keep them in a reasonably safe condition for travelers thereon exercising ordinary care. *Dooley v. Town of Sullivan*, 112 Ind. 451; *Town of Gosport v. Evans*, 112 Ind. 133; *Town of Spiceland v. Alier*, 98 Ind. 467; *Town of Rushville v. Poe*, 85 Ind. 83; *Town of Salem v. Goller*, 76 Ind. 291; *Town of Knightstown v. Musgrove*, 116 Ind. 121; *Town of Marion v. Skillman*, 127 Ind. 130; *Alexander v. Town of New Castle*, 115

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Ind. 51; *Town of Albion v. Hetrick*, 90 Ind. 545; *Town of Rosedale v. Ferguson*, 3 Ind. App. 596; *Wickwire v. Town of Angola*, 4 Ind. App. 253; *Town of Fowler v. F. C. Austin Mfg. Co.*, 5 Ind. App. 489; *Town of Monticello v. Kennard*, 7 Ind. App. 135; *Town of Kentland v. Hagan*, ante, 1.

Many other authorities might be cited, and we know of none to the contrary. The matter is so well settled that we can find no reason for an extended discussion of the subject.

The overruling of appellant's motion for a new trial is assigned as error, and under that assignment counsel for appellant have questioned the sufficiency of the evidence, and have discussed the action of the court in refusing to give to the jury an instruction asked by the appellant.

It does not appear that the reporter's longhand report of the evidence was filed in the clerk's office before it was incorporated in the bill of exceptions.

Under a great number of recent decisions of the Supreme Court and of this court, we cannot treat the evidence as properly before us. Therefore, neither of the matters discussed under the assignment relating to the motion for a new trial can be considered.

Judgment affirmed.

MILLER v. MILLER.

[No. 2,183. Filed May 26, 1897.]

PLEADING.—*Must Proceed Upon a Single Theory.*—A pleading cannot proceed upon more than one theory, and if, in form, it does, the court may construe it as proceeding upon the theory most apparent and most clearly authorized by the facts stated, and require the case to be tried upon that theory. p. 608.

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SAME.—Complaint.—Negligence.—Willfulness.—A complaint alleging that defendant “purposely, wrongfully and negligently,” set fire to certain straw and stubble which he had purposely and negligently permitted to accumulate upon his lands, at a time of drought and while a stiff wind was blowing toward plaintiff’s land, so that it was impossible to control the fire which spread to plaintiff’s premises, proceeds upon the theory of negligence. *pp. 608, 609.*

SAME.—Construction Of.—The language used in a pleading must be given a reasonable and fair construction, and in determining the rights of the parties thereunder the court will look to the nature of the acts alleged. *p. 609.*

APPEAL.—Weight of Evidence.—The Appellate Court will not interfere with the verdict of the jury where there was some evidence to support it. *p. 613.*

From the Randolph Circuit Court. *Affirmed.*

J. A. Shockney, C. D. Bowen and Theodore Shockney, for appellant.

J. A. Cheney, E. L. Watson, J. W. Macy and J. P. Goodrich, for appellee.

ROBINSON, J.—Appellant brought suit against appellee to recover damages for the destruction by fire of certain property. A trial by jury resulted in appellee’s favor.

The only error assigned is the overruling of appellant’s motion for a new trial.

A new trial was asked on the ground that the verdict of the jury was not sustained by sufficient evidence, was contrary to the evidence, and contrary to the law; and for error of the court in giving to the jury certain instructions, and in refusing to give certain instructions requested by appellant.

In the first paragraph of the complaint it is alleged, among other things, that the appellee’s lands adjoined the lands of appellant; that appellee had purposely and negligently permitted a large quantity of straw and stubble to accumulate and to be spread over his land; that on the day of the fire there was, and had

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been for a long time prior thereto, a great drought; that the earth was dry and parched and said stubble and straw were very dry and combustible; that a "stiff" wind was blowing from the direction of appellee's farm towards appellant's land; and while it was very hot and dry, and during said drought, and while the wind was so blowing, the appellee, "without any fault or negligence on the part of the plaintiff, purposely, wrongfully and negligently set fire to said stubble and straw, so allowed to accumulate on his said land, and caused the same to be fired in many places on his said land, so much so that the defendant was not able to, and did not and could not, control the same, and the said fire spread over said straw and stubble, and created a great and furious fire and conflagration, and the same was not controlled by the defendant, but by reason of the carelessness and negligence of the defendant said fire extended to the lands and fences of this plaintiff," destroying appellant's property, and that "said fire was not the result of any fault, carelessness or negligence of this plaintiff."

The allegations of the second paragraph of complaint, as to the manner in which the fire was started, are substantially the same as those of the first paragraph.

The theory of the trial court was, that the case as made by the pleadings and the evidence was an action for damages by reason of negligence, and that the case is not one seeking redress for a willful injury.

Counsel for appellant insist that the acts alleged in the pleading and proved by the evidence show appellee to have been guilty of a positive wrong, and that the injury was willfully committed. A determination of this question will decide many of the questions arising upon the giving and refusing to give instructions to the jury. As stated by counsel in their brief, ap-

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pellant's contention is, that "under the complaint in this action it was not necessary to show that the plaintiff was free from contributory negligence, if, from the evidence, it was shown that the appellee was guilty of a positive wrong."

Every complaint must proceed upon some single, definite theory. This theory can be gathered only from the general scope and tenor of the pleading. Whether a complaint charges a willful tort, or negligent act must be determined from the language used by the pleader. The pleading cannot proceed upon more than one theory, and if it does, the court may construe it as proceeding upon the theory most apparent and most clearly authorized by the facts stated, and require the case to be tried upon that theory. *Batman v. Snoddy*, 132 Ind. 480; *Monnett v. Turpie*, 132 Ind. 482; *Feder v. Field*, 117 Ind. 386; *First Nat. Bank v. Root*, 107 Ind. 224; *Western Union Tel. Co. v. Reed*, 96 Ind. 195, and cases cited; *Mescall v. Tully*, 91 Ind. 96, and cases cited.

The trial court did right in holding that the pleading proceeds upon the theory that the defendant was guilty of negligence. It is true, the pleading alleges that the appellee purposely, wrongfully, and negligently set fire to grass and stubble on appellee's land, and that the fire extended to appellant's land by reason of the carelessness and negligence of the appellee. The allegation that the fire was purposely set is not sufficient to show an aggressive willful tort. Ordinarily, a person has the right to use his premises as he pleases. It is true, all the circumstances existing at the time must be taken into consideration, but the facts alleged are not broad enough to cover appellant's contention. To charge such an act it must appear that the appellee, by his acts, intended to injure appellant, or that he acted with such a disregard

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of appellant's rights that the law will presume that he intended that the results would follow which did follow.

To charge that an act is "purposely" done in a case like that at bar, is not equivalent to a charge that it is "willfully" done. Even if it should be held that these words are equivalent, appellant's contention would not be strengthened. A pleading that avers that an act was negligently and willfully done is inconsistent in itself. Negligence and willfulness are the opposites of each other. An action cannot at once be the result of inattention and indifference, and of intention and design. An act that has been done willfully could not have been done negligently. Negligence implies the omission of duty and excludes the idea of willfulness. A pleading that alleges both is not strengthened, for the difference between the two is clear and well defined, and there is no middle ground upon which the pleader can stand and hope to draw strength from both sources. Beach Cont. Negl., section 62, *et seq.* If the act was willfully done the question of negligence cannot enter into the case. The aggressive wrong and not negligence is the basis of liability for a willful injury. In such a case a plaintiff is required to prove neither the negligence of the defendant, nor his own freedom from contributory negligence. *Chicago, etc., R. R. Co. v. Nash*, 1 Ind. App. 298.

The language used in a pleading must be given a reasonable and fair construction, and in determining the rights of the parties thereunder the court will look to the nature of the acts alleged. The use of epithets adds no force to a complaint. Thus, in *Cleveland, etc., R. W. Co. v. Asbury*, 120 Ind. 289, where the complaint in an action for negligence charged defendant with

negligence, but used the qualifications "wanton," "willful" and "with the intention to injure the plaintiff," it was held that the *gravamen* of the action was simple negligence.

In the case of *Chicago, etc., R. R. Co. v. Hedges, Admr.*, 105 Ind. 398, it was alleged that the appellant "did then and there, carelessly, negligently, purposely, willfully and recklessly detach said locomotive engine from said train of cars, they being then in motion, etc., * * * negligently, purposely, willfully and recklessly leaving said train to follow, etc.," as the decedent "was in the act of passing over said main track, * * * the defendant * * carelessly, negligently, purposely, willfully and recklessly caused said train of cars to approach said crossing, and negligently, carelessly, purposely, willfully and recklessly omitted," to give any signal, and that by reason of "said careless, negligent, willful and reckless management of said train of cars," they ran upon decedent, causing his death, "without any negligence or want of ordinary care on his part." In holding that this complaint did not charge a willful killing, Black, C. J., speaking for the court, said: "Notwithstanding the frequent use of the words, 'purposely' and 'willfully,' the pleading does not charge that the defendant purposely or willfully killed the intestate, or purposely or willfully ran the train upon him, or purposely or willfully caused it to be run upon him. The allegations amount to no more than a charge of killing through negligence." See *Terre Haute, etc., R. R. Co. v. Graham*, 95 Ind. 286.

Although the condition of the atmosphere and the material to be burned may be such at the time that to kindle a fire a person of ordinary prudence would know that sparks would almost inevitably fly into adjacent combustible material and ignite it, yet the ques-

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tion would be one of a negligent act and not a willful tort.

Thus, in *Brummit v. Furness*, 1 Ind. App. 401, the court said: "And so we think it quite analogous to reason that where the fire is immediately surrounded by highly combustible and inflammable material up to the very border of the adjacent proprietor's soil, * * * it cannot be denied that it is an act of negligence to kindle such fire; and that it is a sequence reasonably to be expected that the slightest breeze will carry sufficient sparks of fire into such combustible matter and ignite it, consuming whatever property will burn which lies in its pathway." Citing *Louisville, etc., R. W. Co. v. Nitsche*, 126 Ind. 229, 9 L. R. A. 750.

"It is only necessary to charge, in a complaint which seeks redress for a willful injury, that the injurious act was purposely and intentionally committed, with the intent willfully and purposely to inflict the injury complained of." *Gregory, Admr., v. Cleveland, etc., R. R. Co.*, 112 Ind. 385; *Louisville, etc., R. R. Co. v. Hart*, 2 Ind. App. 130.

"To constitute a willful injury, the act which produced it must have been intentional, or must have been done under such circumstances as evinced a reckless disregard for the safety of others, and a willingness to inflict the injury complained of. It involves conduct which is *quasi criminal*." *Louisville, etc., R. W. Co. v. Bryan*, 107 Ind. 51. See *Louisville, etc., R. W. Co. v. Schmidt*, 106 Ind. 73.

In *Pennsylvania Co. v. Sinclair*, 62 Ind. 301, cited by appellant's counsel, it was held that an averment that a train of cars was running "at a recklessly and grossly negligent and dangerous rate of speed," etc., did no more than charge negligence. In that case the court said: "As a matter of evidence, proof that the misconduct of the defendant was such as to evince an

utter disregard of consequences, so as to imply a willingness to inflict the injury complained of, may tend to establish willfulness on the part of the defendant; but, to authorize a recovery on such evidence, there must be suitable allegations in the complaint to which it is applicable."

Appellant's counsel cite the case of *Louisville, etc., R. W. Co. v. Nitsche, supra*, as sustaining their position that the case at bar shows appellee liable for a willful tort. But we do not understand that case to declare the rule as contended by appellant. It is true, in that case, it is said that the act of the party charged with the wrong was something more than "culpable negligence," and that it was a "positive wrong." That expression was used to characterize the act of a railroad company which, in a season of great drought, set out fire on its right of way which extended over beds of turf or peat, the same material forming the surface of the body of adjoining lands. When it is said that the doing of an act is a "positive wrong," we do not understand that it is meant that a positive wrong results necessarily from an act willfully done. The doing of certain wrongful acts might amount to negligence *per se*, and still fall short of showing the doing of a willful injury. In the case above it was said, that "it was a tortuous act to set out the fire which caused the plaintiff's injury." Thus, it seems that the opinion characterized the act as a positive wrong, and also as a tortuous act, and that these expressions are intended to mean the same. In another part of the opinion it is said that, "One who is himself without fault, has, in justice and common fairness, a right to recover from one who has caused him loss by a tortuous act." Thus it appears that the element of contributory negligence was recognized as an element in that

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case, which would not have been done in case of willful injury.

As we construe the paragraphs of complaint, to entitle the appellant to recover upon his pleadings, the burden was upon him to show, by a fair preponderance of the evidence, that the appellee was negligent, and that he himself was free from any negligence proximately contributing to the injury.

Much of the evidence as to the relative location of certain fields that were burned over, and as to the location of fences and buildings, is very unsatisfactory as it comes to us in the record, for the reason that witnesses testified by referring to a plat that seems to have been used on the trial, but which has not been brought up in the record. After a careful reading of the evidence, we can only conclude that there was evidence upon every material question necessary to sustain the finding of the jury. It is true, on some material points there is a conflict, but this court cannot weigh the evidence to determine where the preponderance lies. The jury saw the witnesses and heard them testify, and under the long settled rule, where there is some evidence to support the verdict, we cannot interfere. The evidence fully sustains the theory of the trial court that the wrong committed by appellee, if one was committed, was not a willful injury. *Isler v. Bland*, 117 Ind. 457; *Balue v. Sear*, 131 Ind. 301; see *Cleveland, etc., R. W. Co. v. Wynant*, 134 Ind. 681; *Louisville, etc., R. W. Co. v. Berkey, Admr.*, 136 Ind. 181.

The only objections urged by appellant's counsel to the instructions given to the jury by the court of its own motion, and to those given to the jury at the request of appellee, are based upon appellant's construction of the pleadings and the evidence, that they show a willful wrong, and not merely a negligent act.

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From what has already been said, this contention can not prevail. As we view the complaint and the evidence, the instructions given to the jury correctly state the law. The instructions requested by appellant, which were refused by the court, are based upon appellant's construction of the pleadings and evidence. The third instruction requested by appellant was as to appellee's liability in the event it should be found that the fire was started by some person other than the appellee, but at his instance and request. Without deciding whether this instruction, as requested, stated the law correctly, it is sufficient to say that upon the point mentioned the jury were instructed by the court.

After careful examination of all the instructions given, we think that, taken as a whole, they contained a full and fair statement of the law applicable to the issue and the evidence in the cause.

We find no error in the record for which the judgment should be reversed.

Judgment affirmed.

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[No. 2189. Filed May 26, 1897.]

APPEAL AND ERROR.—*Waiver of Errors.*—Errors assigned but not discussed in brief are waived. p. 615.

PLEADING.—*Motion to Paragraph, When Properly Overruled.*—A motion to require plaintiff to separate his complaint into paragraphs is properly overruled, where it states a cause of action for damages on account of fraudulent representations in regard to property bought, and also charges defendants with conversion but does not state facts sufficient to constitute a cause of action for conversion. pp. 617, 618.

APPEAL AND ERROR.—*Motion to Paragraph, not Available Error.*—The overruling of a motion to paragraph a complaint is not available error. p. 618.

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From the Montgomery Circuit Court. *Affirmed.*

M. M. Bachelder, for appellants.

Jere West and George Harney, for appellee.

HENLEY, J.—This action in the lower court was by the appellee against appellants. The complaint was in one paragraph.

Appellants' counsel discuss but one alleged error of the lower court. Under the oft repeated decisions of this court, the other errors, if any, assigned, but not discussed, are waived.

It is contended by counsel for appellants that the "trial court below erred in overruling appellants' motion requiring appellee to separate his complaint into paragraphs." No objection is made by counsel for appellee to the sufficiency of the assignment of errors.

We think it is necessary and essential to a proper understanding of the question involved and argued by counsel, to set out in this opinion a copy of the complaint under which such question arises. Omitting the formal parts, it is as follows:

"Plaintiff complains of the defendants and says, that on or about the 23d day of October, 1894, the defendants were the owners of a stock of merchandise, consisting of groceries, queensware and fixtures for conducting such a business, in the town of Ladoga in said above State and county, and that said stock of goods was of the probable value of \$600.00. And plaintiff further avers that the defendants, by gross misrepresentations and by false and fraudulent means, represented to plaintiff that the said stock of groceries were of the value of \$1,500.00, which statements and representations the defendants well knew were false, and that the said stock of goods were only of the value of \$600.00.

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“And plaintiff further avers he was not acquainted with such business and was unaccustomed to judge of the value of such articles and stock, and was ignorant of the true worth of the same, but that the defendants were accustomed to dealing in such articles and were skilled in such business and well acquainted with the value of the same. And plaintiff having great confidence in the defendants and relying on the representations made to him by them, was thereby induced to purchase a one-half interest in said stock of goods for \$700.00, paying to the defendants \$400.00 in cash and giving his promissory note for \$300.00, secured by chattel mortgage on the one-half interest in said stock of goods, to be paid on the 24th day of April, 1895, and plaintiff further avers that he entered into the possession of said stock pursuant to their agreement and sale, and that after learning something of the nature of the said business, he learned of the fraud and deceit practiced by defendants on him, but relying on their statements that it would be adjusted when the mortgage became due, and relying on the statements that there were other goods due them from the wholesale houses he continued in said business with them.

“That on or about the 11th day of May, 1895, the defendants, by false allegations and fraudulent means, obtained from plaintiff the key to the store-room where said business was conducted and forcibly and without plaintiff's consent locked the same and refused his admission to the same, but took the same and converted them to their own use.

“On account of said fraudulent sale and misrepresentations and forcible detention of property, and for the loss of his time and money, the plaintiff has been damaged in the sum of one thousand dollars.

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“Wherefore, plaintiff demands judgment for one thousand dollars, and other relief.”

It will be seen by the complaint and the prayer for relief thereunder, that the pleader manifestly intended that the same should be an action for damages on account of fraudulent representations in regard to the property bought. That the complaint does this, is not controverted by appellants, but it is contended that an additional cause of action is stated in the complaint, in that it charges the appellants with conversion. If sufficient material facts are stated in the complaint upon which an issue could have been formed, and appellants tried for conversion of appellee's goods, then appellants' contention might be well founded, under the earlier decisions.

In the case of *Booher v. Goldsborough*, 44 Ind. 490, the Supreme Court adopted the rule deduced from *Stephens*, “That to render a pleading double, there must be in substance two good causes of action or defense. The matter must be so pleaded that issue may be taken on it; and as issue cannot be taken on matter that is immaterial, such matter will not bring a pleading within the rule against duplicity.” Also, see *Hendry v. Hendry*, 32 Ind. 349; *Swinney v. Nave*, 22 Ind. 178.

In the case of *Hervey v. Parry*, 82 Ind. 263, the Supreme Court reversed the judgment of the lower court because the lower court overruled the motion of the plaintiff to require the separation of defendant's answer into three paragraphs.

Under the rule as adopted by the Supreme Court in *Booher v. Goldsborough*, *supra*, the contention of appellant cannot be maintained because the allegations in the complaint as to conversion are immaterial, and do not go far enough to state a sufficient cause of action upon which an issue could be made. Many of the

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essential averments of an action for conversion are entirely absent and no damages are demanded therefor. But the error is not available for another reason which counsel for both appellee and appellant seem to have overlooked. The Supreme Court in the case of *Wabash, etc., R. W. Co. v. Rooker*, 90 Ind. 581, said: "That a paragraph of complaint contains more than one cause of action, justifies a motion to require them to be stated separately; but to overrule the motion is not available error."

In the case of *Mansfield v. Shipp*, 128 Ind. 55, the Supreme Court following the rule announced in *Wabash, etc., R. R. Co. v. Rooker, supra*, said: "It is held not to be error to overrule a motion to require the plaintiff to separately state and number his causes of action, when more than one is stated in a paragraph." And in the late case of *Richwine v. Presbyterian Church, etc.*, 135 Ind. 80, the Supreme Court, in an opinion by Howard, J., says: "Whether the motion to separate the complaint into paragraphs should have been allowed, need not be inquired into. The error, if any, was harmless; and, in any case, could not avail on appeal."

The three last mentioned cases were decided without overruling or criticising the former opinions of the court. It is manifest that there is a conflict between the earlier and the recent decisions. This, however, does not help appellants, for from whichever way viewed there was no error in overruling the motion.

Judgment affirmed.

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LOUISVILLE, NEW ALBANY AND CHICAGO RAILROAD
COMPANY v. RENICKER.

[No. 2195. Filed May 26, 1897.]

PRACTICE.—*Special Verdict.*—*Motion for Judgment On.*—A motion by defendant for judgment on a special verdict will be considered as having been refiled, where defendant moved for a reduction of the damages awarded plaintiff while the former motion was pending, and the court treated it as still pending and ruled thereon without the withdrawal of the motion to reduce the damages.

SAME.—*Verdict.*—*Error in Assessment of Damages.*—*New Trial.*—*Statutory Construction.*—The only way the amount of damages named in the verdict of a jury can be questioned, where the action is upon a contract, or for the injury or retention of property, is by a motion for a new trial, assigning the fifth statutory cause as provided in section 568, Burns' R. S. 1894 (559, R. S. 1881).

DAMAGES.—*When Not Excessive.*—A verdict for \$400.00 against a railway company for carrying a young and inexperienced girl beyond her station to a point where she could not safely alight, and then instead of returning to such station as promised, carrying her half a mile beyond another station, at which the conductor also promised to stop, is not, as a matter of law, excessive.

From the Jasper Circuit Court. *Affirmed.*

E. C. Field, W. S. Kinnan, Walter B. Olds and W. B. Austin, for appellant.

Simon P. Thompson, for appellee.

COMSTOCK, J.—This case was reversed in this court in 1893, and is reported in 8 Ind. App. 404. Subsequently, an amended complaint was filed in the lower court, and the cause put at issue by a general denial. The theory of the amended complaint is that the appellee was injured by reason of the violation of the implied contract made by appellant to safely carry her to her destination, and permit her to alight there. There was a trial by jury, a special verdict, and assess-

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ment in favor of appellee for four hundred dollars, and a judgment rendered for that amount.

The only errors assigned, urged by appellant, are numbered three, four and five, and are upon the following grounds: (3) Error in overruling appellant's motion for judgment in its favor on the special verdict; (4) Error in overruling motion to change and modify the judgment; (5) Error in overruling appellant's motion to modify the judgment in this, to reduce the amount of recovery to fifty dollars, for the reason that there are no facts found in the verdict authorizing any judgment for a larger sum, and for the reason that on the facts found in said special verdict, the amount for which said judgment is entered is improper.

January 20, 1896, the jury returned the special verdict, on which verdict appellant moved for judgment in its favor. On January 24, 1896, while said motion was still pending, appellant moved the court for a reduction of the damages awarded plaintiff from four hundred dollars, to fifty dollars. March 26, 1896, appellant withdrew its motion for a reduction of the amount of damages awarded appellee. March 31, appellant's motion for a judgment on the verdict was overruled and it refiled its motion for a reduction of the amount awarded to fifty dollars. April 1, 1896, appellee moved the court for judgment in her favor on the special verdict, which motion was sustained and appellant excepted. Appellant then moved the court to reduce the amount of recovery in said judgment to fifty dollars, for the reason that there were no facts found in the special verdict authorizing any judgment for a larger sum, and that on the facts of said special verdict the amount for which said judgment is entered is an improper judgment. Appellee contends that the filing of the motion to reduce the

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amount of recovery while the motion before filed for a judgment on the verdict was undisposed of, amounted to a waiver of that motion, because the two motions are inconsistent, and that as, after the withdrawal of the motion for the reduction aforesaid, the motion for judgment was not refiled, it is not to be considered on appeal.

We think the more reasonable view to take is, that inasmuch as the court treated it as still pending in the case, and ruled upon it without the withdrawal of the second motion, that it should be considered as having been refiled.

Appellant's motion to reduce the amount of damages does not fall within the fourth or fifth errors assigned, for they refer to the overruling of the motion to modify the judgment subsequently rendered. Appellee insists that the overruling of the motion to modify the judgment assigned as the fourth and fifth errors, is not available, claiming that the only way that the amount of the damages named in the verdict of a jury can be questioned is by a motion for a new trial, assigning the fifth cause in actions on contract, and assigning its overruling as error.

Elliott on Appellate Procedure, section 855, says: "A party cannot attack the assessment of damages unless he assigns as a cause for a new trial the specific reason that the amount awarded is erroneous."

Section 856: "The rule in this state is that in order to question the amount of damages assessed in actions * * * *ex contractu*, the fifth statutory cause must be specified."

Said fifth cause reads as follows (section 559, R. S. 1881): "Error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract or for the injury or retention of property."

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There being no motion for a new trial, appellant did not pursue the only method prescribed of saving the questions raised by the fourth and fifth assignments.

The third assignment, then, only remains for our determination. This assignment challenges (1) the sufficiency of the special verdict to uphold any judgment in favor of appellee; (2) the sufficiency of the special verdict to uphold the judgment for the amount rendered.

It appears from the special verdict that the appellant was a corporation owning and operating a railway extending from Delphi to Fair Oaks, Indiana, and was a common carrier of passengers. It owned depots and platforms at Delphi, Rensselaer and Surray, which were safe and convenient for travelers to enter and depart. Its trains ran daily and were scheduled to stop at Rensselaer. It had authority at Delphi to issue tickets to Rensselaer. The appellee bought a ticket at Delphi for Rensselaer and paid for the same \$1.15.

She was young and inexperienced, traveling alone, and carrying a satchel weighing 25 pounds. She expected to meet her parents at Rensselaer, at which place they were that day, with a conveyance. Her parents resided eight miles from Rensselaer and seven miles from Surray. She had friends at Rensselaer with whom she expected to stay and await an opportunity to reach home. She gave up her ticket. The car did not stop at Rensselaer, but ran about one thousand feet beyond, and stopped where the appellee could not safely alight. When the car stopped she left her seat and walked to the platform of the car for the purpose of alighting therefrom. The servants of defendant promised to return the train to the platform. Appellee believed this and at the request of ap-

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pellant's servants, went back into the car, but the train started for Chicago and did not return to Rensselaer. They promised to stop at Surray. After the train had proceeded a mile or two, plaintiff was asked to elect between getting off at the station of Surray, or Fair Oaks, stations next north of Rensselaer, and she would be given a return check from Fair Oaks, at which station she would be required to wait six hours for a train passing her back to Rensselaer on the next south bound train, and the plaintiff decided to get off at Surray, the next station north of Rensselaer. This was the next station on the railway to her home, where it was her purpose to go in making this journey. That her brother resided on a farm about one mile from Surray, and after purchasing her ticket at Delphi she desired and requested the agent to sell her a ticket to Surray, was advised by the agent that the train was not scheduled to stop there; whereupon she purchased her ticket for Rensselaer. The train was not stopped at Surray, and not until it had run by the station about a quarter of a mile. There the train stopped and the plaintiff walked to the platform and the conductor got off the car and assisted her to alight. She alighted from the second step from the bottom, but why she did not alight from the last step of the car there is no evidence to show. When she alighted it was 5 o'clock a. m., but was broad daylight; she knew her brother lived near Surray, and was well acquainted with the country in that vicinity. The ground upon which she alighted was smooth, inclining at a grade of one foot in three feet from the end of the ties to a ditch about six feet distant. The walk over the distance of this quarter of a mile to the station was level and smooth. The step down to the ground from the second step of the car was from three to four feet. She was slightly assisted by the brake-

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man and alighted upon her feet and did not fall or strike anything. She immediately afterward walked to the residence of the station agent, one-half mile distant, carrying her valise. There she left her valise and walked directly to the house of one Kenton, a distance of half a mile, and from there she walked to the residence of her brother. She walked without limping, or in any manner indicating that she had received any injury. She made no complaint of any injury to the agent at Surray with whom she talked, nor to Mr. Kenton, nor his wife, with whom she visited, and she did not consult any physician until July 14, and not until after she had employed an attorney to prosecute her case; and the only purpose of such employment was to qualify the physician as a witness in this case. There is no finding that appellee received physical injury.

The amended complaint was evidently drafted with a view of coming within the ruling of *Evansville, etc., R. R. Co. v. Kyte*, 6 Ind App. 52. The judgment on the special verdict can only be upheld on the theory of breach of contract with aggravating circumstances. The damages resulting, were caused by reason of the violation of a contract, which violation was attended with anxiety of mind and disappointment, and physical inconvenience and discomfort to appellee. The violation of the contract does not seem to have been accompanied by any extenuating circumstances. Appellant concedes, by its last motion, that it was at fault.

Under all the circumstances the jury found four hundred dollars to be a reasonable compensation, and the trial court who presided held that the finding was justified. We cannot say that the amount was excessive.

Judgment affirmed.

WILEY, C. J., took no part.

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THE NORTH BRITISH MERCANTILE INSURANCE COMPANY
v. KOONTZ.

[No. 2200. Filed May 26, 1897.]

APPEAL AND ERROR.—*Failure to Discuss Error Assigned.—Waiver of Error.*—An assignment of error is waived by failure of appellant to discuss same. *p. 626.*

SAME.—*Evidence.—Weight Of.*—Where there is some evidence in the record which fairly supports the facts found a judgment will not be disturbed on the ground that the findings of the court are not sustained by the evidence. *pp. 626, 627.*

PRACTICE.—*Special Finding.—Exception.*—When the court, at the request of either party, makes a special finding of facts, and states its conclusions of law thereon, an exception to the conclusions of law is an admission, for the purpose of the motion, that the facts are fully and correctly found. *p. 627.*

SAME.—*Special Finding.—Amendment After Judgment.*—After the court has made its finding of facts, stated its conclusions of law, and rendered judgment thereon, such court has no power to amend and supply defects in a special finding on motion of one or the parties. *p. 627.*

APPEAL AND ERROR.—*Assignment of Error.—Special Finding.*—Where there is a special finding of facts and conclusions of law thereon, to present any question in the appellate tribunal as to the correctness of the conclusions of law, there must be an assignment of error that the court erred in its conclusions of law. *p. 628.*

From the Madison Superior Court. *Affirmed.*

Bishopp & Scanlan, for appellant.

William A. Kittinger and Edward D. Reardon, for appellee.

WILEY, C. J.—Appellee held a policy of insurance issued by appellant, insuring him against loss by fire of certain personal property therein described. Before the expiration of the policy, and after the appellee had paid the full premium demanded by appellant, the property covered by said policy was wholly destroyed by fire.

The appellee sued the appellant upon the policy to recover for the loss sustained, and upon issue being joined the cause was submitted to the court for trial, and at the request of appellant the court made a special finding of facts, stated its conclusions of law, and pronounced judgment thereon in favor of appellee.

There are six specifications in appellant's assignment of errors, but none of them present any question for our consideration except the first and fourth, and they are as follows:

First: The court erred in sustaining plaintiff's demurrer to the second paragraph of defendant's answer.

Fourth: The court erred in overruling defendant's motion for a new trial.

The first assignment of error is waived by appellant's failure to discuss it. Appellant's motion for a new trial was for the statutory grounds: (1) that the findings of the court are not supported by sufficient evidence, and (2) that the findings of the court are contrary to law.

After the court had made its special findings of facts, stated its conclusions of law and pronounced judgment thereon, appellant moved the court to modify certain of its findings, and to make other findings of fact, which motion was overruled and appellant excepted.

It should be stated, before proceeding further, that after the court had announced its conclusion of law, and before judgment had been pronounced thereon, the appellant excepted to the conclusion of law as stated by the court.

We have examined the evidence with much care, and while there is a sharp conflict, the findings of the court are fairly sustained by the evidence. There is in the record, evidence which supports the findings of

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fact as made by the court, and under the long and well established rule, this court will not examine and weigh the evidence, and hence, cannot disturb the judgment on that ground. But, in this case, there is an additional reason why the judgment cannot be disturbed on the ground that the findings of the court are not sustained by the evidence, and that is, the appellant waived the question by its exceptions to the conclusions of law. When the court, at the request of either party, makes a special finding of facts, and states its conclusions of law thereon, an exception to the conclusions of law is an admission for the purpose of the motion that the facts are fully and correctly found. *Gray v. Taylor*, 2 Ind. App. 155; *Fulp v. Beaver*, 136 Ind. 319; *McCrory v. Little*, 136 Ind. 86; *Blair v. Blair*, 131 Ind. 194; *State, ex rel. v. Vogel*, 117 Ind. 188; *Neisler v. Harris*, 115 Ind. 560; *Warren v. Sohn*, 112 Ind. 213; *Gardner v. Case*, 111 Ind. 494.

In such case, if the court finds and states the facts contrary to the evidence, the remedy is by a motion for a new trial, and not by a motion to modify or correct the findings. *Gray v. Taylor, supra*; *Gardner v. Case, supra*; *Quill v. Gallivan*, 108 Ind. 235; *Dodge v. Pope*, 93 Ind. 480; *Bertelson v. Bower*, 81 Ind. 512; *Ex parte Walls*, 73 Ind. 95.

Appellant's motion to modify the special findings came too late. The court made its special findings of facts, stated its conclusions of law, and rendered judgment thereon on March 3, 1896, and on the succeeding day the appellant moved the court to modify the findings.

After the court has made its finding of facts, stated its conclusions of law, and rendered judgment thereon, such court has no power to amend and supply defects in a special finding on motion of one of the parties. *Hartlepp v. Whiteley*, 129 Ind. 576; *Hartlepp*

v. *Whitely, etc. Co.* 131 Ind. 543; *Clark v. State, ex rel.*, 125 Ind. 1; *Wray v. Hill*, 85 Ind. 546; *Levy v. Chittenden*, 120 Ind. 37; *Bunch v. Heart*, 138 Ind. 1; *Hilgenberg v. Northup*, 134 Ind. 92.

By a strict construction, appellant has not assigned any available error in this court. True, in its motion for a new trial, the second reason assigned therefor was that the findings of the court are contrary to law, and one of the assignments of error is the alleged error of the court in overruling appellant's motion for a new trial.

The rule seems to be well settled in this State, that where there is a special finding of facts and conclusions of law thereon, to present any question in the appellate tribunal as to the correctness of the conclusions of law, there must be an assignment of error that the court erred in its conclusions of law. *Nading v. Elliott, Tr.*, 137 Ind. 261; *Buskirk's Practice*, p. 205; 1 *Works Practice and Pleading*, section 809; *Lewis v. Haas*, 50 Ind. 246; *State, ex rel. v. Bery*, 50 Ind. 496; *Selking v. Jones, Admr.*, 52 Ind. 409; *Hartman v. Aveline*, 63 Ind. 344.

Counsel for appellant, in their brief have argued but two questions: (1) the action of the court in overruling its motion to modify the special findings, and (2) the weight of the evidence. As to the first, we have shown that it is not properly presented by the assignment of error, and as to the second, which is presented by the fourth specification of the assignment of error, we have already disposed of by saying that there is some evidence in the record which fairly supports the facts found. This being true, we cannot disturb the judgment on that ground.

After a very careful examination of the entire record, we think the case was fairly tried and a correct conclusion reached.

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There is no error in the record for which the judgment should be reversed.

Judgment affirmed.

BYRAM ET AL. v. FOLEY.

[No. 2202. Filed May 26, 1897.]

SEWERS.—*Collateral Drains.—Assessments.—Complaint for Collection of Assessments.—Statute Construed.*—Property abutting on an alley through which a collateral drain to a local sewer has been constructed may be assessed for the construction of such local sewer, under section 3857, Burns' R. S. 1894. *pp.* 632–635.

SAME.—*Assessments for Construction.—Remonstrance.—Collateral Attack.*—Section 3858, Burns' R. S. 1894, confers upon the board of public works of the city of Indianapolis the power to assess property for the construction of local sewers and collateral drains, and also provides a remedy for the property owner by permitting him to remonstrate within a time fixed by statute, and if the property owner fails to avail himself of his right to remonstrate, he has had his day in court, and in an action to enforce the lien of the assessment he cannot attack the assessment by an answer averring that his property was not benefited. *p.* 636.

SAME.—*Jurisdiction of Board of Public Works to Make Assessments.—Collateral Attack.—Statute Construed.*—The assessment for the construction of a sewer in the city of Indianapolis is within the jurisdiction of the board of public works, under the act of March 6, 1891, and acts amendatory thereto, and its acts are conclusive, in the absence of fraud, and such assessment cannot be declared void in a collateral attack. *p.* 637.

SAME.—*Action by Contractor to Enforce the Collection of Assessments.—Presumption of Regularity.—Collateral Attack.*—In a collateral attack upon the right of a contractor to enforce the assessment for the construction of a sewer, every presumption will be indulged in favor of the action of the city through its board of public works, and unless the complaint discloses a state of facts which shows clearly that the assessment is void, its regularity will be presumed. *p.* 637.

SAME.—*Double Assessment.—Statute Construed.*—Property abutting on a street on which a local sewer has been constructed may be assessed for the payment thereof under section 3857, Burns' R. S. 1894, notwithstanding such property had previously been assessed for the construction of a sewer. *pp.* 637–639.

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From the Marion Superior Court. *Affirmed.*

Chas. E. Averill, for appellants.

E. A. Parker, for appellee.

WILEY, C. J.—January 19, 1894, the board of public works of the city of Indianapolis, adopted a resolution declaring the necessity of, and providing for the construction of a local sewer. That resolution was as follows:

“Resolved, by the board of public works of the city of Indianapolis, that the construction of a local sewer intended and adapted only for local use by the property holders whose property abuts thereon, and not intended or adapted for receiving sewage from collateral drains, be, and the same is hereby ordered in and along the following streets and alleys, to-wit:”

Then follows a description of the route of the main and lateral sewers, and the character of the proposed work.

The proceedings were had under the act approved March 6, 1891, and the amendatory acts thereto, providing for the incorporation and government of cities having more than one hundred thousand population according to the United States census last preceding the original act. Such proceedings were had before the board of public works as that the contract for the construction of said sewer was let to the appellee, who completed the work to the approval and acceptance of the board. Certain property owned by appellant, Norman S. Byram, was assessed for the construction of the sewer, and the appellee prosecuted his action below to enforce the lien of the assessment and to recover judgment for the amount found to be due.

It is not necessary to set out the complaint at length, as it is enough to say that it sets out in detail

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all the acts and orders of the board fixing the lien on appellants' property, and is accompanied by a copy of the original resolution, specifications and plans, the assessments, and a plat as exhibits thereto. The appellants attacked the sufficiency of the complaint by a demurrer, which was overruled, and they excepted. They then answered in two paragraphs: (1) general denial; (2) that the lots owned by appellant, Norman S. Byram, and against which it was sought to enforce a lien, were situated on Illinois street in said city, in which said street, prior to the letting of the contract for the construction of the sewer in question, a local sewer had been constructed by the authority of said city, adequate for the use of the property on said Illinois street, including the lots of appellant described in the complaint. It was further averred in the answer that the sewer for which an assessment was sought to be enforced was a local sewer, and that no plat of any district to be drained by said sewer was ever made, or caused to be made by the board of public works of said city, nor was any attempt ever made to require any other property fronting on said Illinois street to pay or become liable for any part or portion of the cost of said sewer, "but that said lots owned as aforesaid by said defendant, Norman S. Byram, were and are the only lots abutting on said Illinois street against which an assessment was made for said sewer."

The appellee demurred to this second paragraph of answer, which demurrer was sustained and appellants excepted. The overruling of the demurrer to the complaint, and the sustaining of the demurrer to the second paragraph of answer are the only errors assigned.

As substantially the same question is raised by each assignment of error, they may both be considered to-

gether. The real question to be decided is fairly and forcibly stated by counsel for appellants in his brief as follows:

“Had the board of public works * * * in 1894, and under the provisions of the statute then in force, the power and authority to assess the property on Illinois street for the payment of a sewer in Tennessee street, by including in the original resolution, and all subsequent proceedings, a small collateral drain, and thus bring within the scope of the assessing power, property not benefited by the proposed sewer for the reason that it was situate upon another street parallel to the one upon which the proposed local sewer was to be constructed?”

For the solution of this question, we must look, primarily, to the statute itself. By the act approved March 6, 1891, and the amendatory acts thereto, provision is made whereby the board of public works of the city of Indianapolis are authorized to have constructed two specific kinds of sewers.

Section 3856, Burns' R. S. 1894 (6898, Horner's R. S. 1896), provides, generally, for the construction of sewers. Section 3857, Burns' R. S. 1894 (6899, Horner's R. S. 1896), is as follows: “Whenever any such sewer shall, from its size and character, be intended and adapted only for local use by property holders along the line of the street or alley on which it is constructed, and, in the opinion of such board, it is not intended or adapted for receiving sewage from collateral drains, then, and in that case, the whole cost of said sewer, and all appurtenances shall be paid for by the holders of property abutting on the street, alley or public highway, on which said sewer shall have been constructed. The cost of such sewer shall be estimated according to the total number of square feet of property abutting on the line of said sewer, and such

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cost shall be apportioned on the lands or lots abutting thereon, in the proportion that their area bears to the total assessed area.”

Section 3858, Burns' R. S. 1894 (6900, Horner's R. S. 1896), provides for the construction of general sewers embracing a certain area or a fixed district, and all the property within such area or district is made liable to an assessment for the construction of the work. In the present case the original resolution adopted by the board of public works fixed the character of the sewer for the construction of which the appellants' property was assessed. The proposed improvement, under the express provisions of the statute, was local in its character, and hence the powers of the board of public works to assess property for its construction was governed and must be controlled by section 3857, *supra*, and we must look to that section for the power and authority of the board of public works to assess appellants' property.

If the complaint does not affirmatively show that appellants' property abuts upon the line of the sewer or upon the line of a collateral thereto, then such property was not subject to assessment for its construction, and if such be the fact, then the complaint did not state a cause of action against the appellants. If, however, it does appear from the complaint and the exhibits thereto that the appellant's property did abut upon the proposed sewer, or one of the collaterals thereto, then such property was subject to assessment and the complaint was good, unless there is some exception to the general rule. The route of the sewer, as fixed by the original resolution, and as specifically described in the complaint, is as follows: “Beginning in the center of Tennessee street at the north line of St. Clair street, then extending north in Tennessee street to the south line of Seventh street; also

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beginning at the center of Tennessee street and extending east in each of First street, Third street, Fourth street, Fifth street, and Sixth street, to the first alley east of Tennessee street; also beginning in the center of Tennessee street and extending east in the first alley north of Sixth street to the first alley east of Tennessee street, then north in said alley to the south property line of Seventh street; also beginning in the center of Tennessee street and extending west along the south line of Seventh street to a point 195 feet west of the west property line of Tennessee street."

Th appellants' property is described in the assessment roll and in the complaint as "Lot number three, and the south half of lot number two, in block 29, of Drake's addition to the city of Indianapolis." From the allegations of the complaint and the exhibits therewith filed, it clearly appears that appellants' property fronts on Illinois street, and extends westward from the west line of Illinois street to the south line of the alley running north and south between Illinois and Tennessee streets. A collateral to the main sewer is described both in the original resolution and the complaint as beginning in the center of Tennessee street, extending eastward through the next alley north of Sixth street to the first alley east of Tennessee street and thence north in said alley to the south property line of Seventh street.

It clearly appears from these averments, descriptions, and exhibits, that appellants' property abuts on the alley leading south from the south property line of Seventh street between Illinois and Tennessee streets along which the collateral to said sewer last above described was constructed.

We must hold, therefore, that the appellants' property was within the plain letter of the statute subject

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to assessment, on the ground that the sewer for which it was assessed was a local one, and the property of the appellant, Norman S. Byram, abutted upon an alley through which one of its collaterals was constructed.

Referring to the statute under which the sewer in controversy was constructed, appellants' learned counsel insist that it was the intention of the legislature to impose such restrictions upon the board of public works that it could not bring within reach of the assessment, property which would not be benefited by the proposed work, and also to prevent an unjust burden from being placed upon property. In this contention counsel are probably correct. It is a well established rule that in the construction of statutes it is the prime object to ascertain and carry out the purpose of the legislature in enacting them. *City of Evansville v. Summers*, 108 Ind. 189, and cases there cited.

The statute under which these proceedings were had is a remedial statute, and, as was said in *State v. Canton*, 43 Mo. 48, "It is an established rule, applicable to the construction of all remedial statutes, that cases within the reason though not the letter of a statute shall be embraced by its provisions; and cases not within the reason, though within the letter, shall not be taken to be within the statute."

In *City of Evansville v. Summers*, *supra*, this rule was quoted with approval by the Supreme Court.

In so far as the facts appear by the record in the case now in hand, it was both within the letter and reason of the statute that an assessment should be made upon appellants' property for the construction of the sewer. It is the letter of the statute that property abutting upon such sewer shall be assessed for its construction, and it is certainly within the reason of

the statute that such assessment should be made. It is not denied by appellants' counsel that appellants' property does abut upon the alley through which a collateral of the main sewer passes, but he avers in his answer that the construction of the sewer did not benefit his property, for the reason that a local sewer had theretofore been constructed along Illinois street, upon which his said property fronts, adequate for the use of his said lots, etc.

After the work has been done and assessments made, it is too late to interpose the defense that the improvement did not benefit the property against which the assessments were made. Section 3856, (6898), *supra*, provides a remedy for the property owner by permitting him to remonstrate, if he do so within the time fixed by the statute, and if he fail to do so he must abide the decision of the board of public works.

In the language of the statute, "Such action shall be final and conclusive upon all owners or holders of property * * * intended to be drained and assessed for the construction of said sewer."

The board of public works in the city of Indianapolis, under the act of March 6, 1891, and the amendatory acts thereto, is clothed with power "to lay out, design, order, contract for and execute the construction, alteration and maintenance of all public drains or sewers." etc.

The statute further confers the power upon such board to assess property for the construction of such drains and sewers, and if the property owner fails to avail himself of his right to remonstrate, he has had his day in court, and in an action to enforce the lien of the assessment he cannot attack the assessment by an answer averring that his property was not benefited. This would be a collateral attack, and it has

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been uniformly held in this State that it is not available.

The assessment for the construction of a sewer in the city of Indianapolis is within the jurisdiction of the board of public works under the act of March 6, 1891, and the amendatory acts thereto, and its acts are conclusive, in the absence of fraud, and such assessment can not be declared void in a collateral attack. See *Jackson v. Smith*, 120 Ind. 520.

In a collateral attack upon the right of a contractor to enforce the assessment for the construction of a sewer, every presumption will be indulged in favor of the action of the city through its board of public works, and unless the complaint discloses a state of facts which show clearly that the assessment is void, their regularity will be presumed. *City of Elkhart v. Wickwire*, 121 Ind. 331.

The only remaining question which the appellant, Norman S. Byram, discusses is that his second paragraph of answer averred that his property had previously been assessed for the construction of a sewer, and that the subsequent assessment constituted a double assessment, and for that reason the board of public works had no power to assess it again, and that the latter assessment, for that reason, is void.

A simple illustration will make plain that in this contention appellant is without support either in reason or authority. Suppose appellant owned, in the city of Indianapolis, an unplatted square of ground, and that it was bounded on all four sides by streets; that along one of the streets a sewer had been constructed, and his property had been assessed therefor; that subsequently a sewer should be constructed along the street on the opposite side of the square, it could not be contended, upon any reasonable hypothesis within the letter and meaning of the statute, that

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his property could not be assessed for its construction.

The statute says "The whole cost of said sewer and all appurtenances shall be paid for by the holders of property abutting on the street, alley or public highway on which said sewer shall have been constructed."

In this case appellant's property fronts on Illinois street, and it had been assessed for the construction of a sewer on that street. His property also runs back towards Tennessee street, to an alley, and along that alley the board of public works has constructed another sewer and assessed his property. The property abutting on that alley comes within the letter of the statute and clothes the board of public works with authority to assess it. It may be a hardship, and appear unreasonable and unjust that appellant's property should be subjected to a second or double assessment for sewer purposes, but the remedy is not in the courts, but in the legislative branch of the government.

In *Coburn v. Bossert*, 13 Ind. App. 359, this court, speaking by Reinhard, C. J., said: "The power in the officers to determine when they should act in the premises carries with it the power to determine how frequently they shall act. The power is a continuing one, just as is the power to determine when a street should be improved. * * * The power to order the construction of a sewer for drainage rests upon the same ground as that of ordinary street improvements. The necessity for a sewer, like the necessity for a street improvement, must be determined by the municipal officers, and comes within their discretion. Unless it can be said that this discretion has been abused, courts cannot intervene. * * * It is proper to say that we think a great hardship has been im-

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posed upon the appellants in this instance by what practically amounts to a double assessment upon the whole area of their property. The remedy for such hardships, however, must be sought in the legislature and not in the courts."

The averments, therefore, of appellants' second paragraph of answer, setting up the double assessment on their property, under the statute and the authorities, do not make the answer good, and there was no error in sustaining the demurrer thereto.

Judgment affirmed.

THE SINGER MANUFACTURING COMPANY v. SULTS.

[No. 2204. Filed May 26, 1897.]

EVIDENCE.—*Parol Testimony not Admissible to Vary Written Contract.*—Parol testimony is not admissible to vary the terms of a written contract which is complete in itself and free from ambiguity.

From the Noble Circuit Court. *Reversed.*

Levi W. Welker, for appellant.

Thomas M. Eells, for appellee.

COMSTOCK, J.—This was an action brought by appellant against the appellee to recover possession of a sewing machine. Appellee answered the complaint by a general denial. Prior to bringing the action, to-wit: on the 17th day of May, 1895, appellant, by written contract, had sold the machine in controversy to appellee, by the terms of which contract the title to the machine was to remain in appellant until it was fully paid for, and upon failure of appellee to pay for the same as provided in said contract, appellant was entitled to its immediate possession. The cause was

submitted to the court for trial, and the court found that the machine was the property of appellee, and that she was entitled to the possession thereof. Appellant filed a motion for a new trial, which was overruled and excepted to. This ruling is assigned as error.

The written contract entered into between appellant and appellee for the sale and purchase of the machine was read in evidence. Appellee admitted that she had made but one payment, and that she refused to make any further payments. It was also admitted upon the trial that appellant made demand of appellee for the machine before the commencement of the action. Appellee was permitted, over the objection of the appellant, to testify that before the written contract of sale was entered into, it was agreed between appellant and appellee that if appellee would purchase the machine and her husband, who was absent, should be dissatisfied with the purchase, and would not approve of the same, that the appellant would return an old machine it received in part payment for the machine in suit, and the money delivered by appellee to appellant, and take away the machine in controversy. After appellee had testified to this parol agreement, appellant moved to strike out that part of her testimony in regard to any verbal agreement made before or at the time of the making of the written contract upon the ground that the entire agreement was merged in the written contract, and that the evidence would only tend to modify the terms of the written contract. The motion was overruled and appellant excepted. The same objections were made to two other witnesses' testimony stating the conversation that took place at the time of the execution of the written contract between the appellant and appellee.

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It is insisted by appellant that this ruling is erroneous; the contract is full in its terms, and free from ambiguity.

In *Hostetter v. Auman*, 119 Ind. 7, the court says: "If there is one question better settled than another by numerous decisions of this court, that question is, that when a written contract is executed all previous negotiations and understandings are merged in the writing, and parol evidence cannot be introduced to vary or control its legal effect. The writing which the witness Booker executed to the appellant evidenced a sale of one hundred and six oak trees on a certain tract of land, by the said witness to the appellant; it stated the consideration and its payment. It was not competent to prove by the witness his understanding of the legal effect of the writing, whether he understood it to be a receipt or a contract, nor to whom he supposed he was selling the timber; nor was it competent to prove by the appellee, either to contradict the writing or to control its legal effect, former negotiations which he had had with the appellant or with Booker." See, also, *Diven v. Johnson*, 117 Ind. 512, 3 L. R. A. 308; *Fordice v. Scribner*, 108 Ind. 85, and authorities there cited.

Where a contract is complete, it cannot be explained, modified or changed by inserting any conditions by parol. *Brunson v. Henry*, 140 Ind. 455; *Stevens v. Flannagan*, 131 Ind. 122; *The Western Paving and Supply Co. v. Citizens Street R. R. Co.*, 128 Ind. 525; *Conant v. The National State Bank of Terre Haute*, 121 Ind. 323; *Pickett v. Green*, 120 Ind. 584; *Stewart v. Babbs*, 120 Ind. 568.

The claim made by appellee that just before the execution of the written contract it was agreed that if her husband should not be satisfied with the contract

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and sale, appellant was to return to appellee the old machine and take the new one. This was a promise to be performed at a future time, and when the parties entered into the written contract all such negotiations were merged, although they were wrongfully made with the intention to deceive, and fraud could not be predicated thereon. *Brown v. Russell & Co.*, 105 Ind. 46; *Ice v. Ball*, 102 Ind. 42; *Burt v. Bowles*, 69 Ind. 1.

In *Bethell v. Bethell*, 92 Ind. 318, the court says: "It is true a promise to do a thing in the future is not fraud, although there may be no intention of fulfilling the promise; for fraud consists in the misrepresentation of an existing fact."

Appellee testified upon cross-examination that she understood it was by the terms of the written contract that she purchased the machine. The contract was entered into after appellee had been informed that the Singer people could not leave a machine on trial; that if she wished it she would have to make the purchase.

Appellee insists that the ruling of the court was correct, and cites in support thereof Stevens' Digest of Evidence, 105, 108; Abbott's Trial Evidence, 294; 2 Wharton's Evidence, sections 927, 1067, and notes; 1 Greenleaf Evidence, section 284; *Deering v. Thom*, 29 Minn. 120; *Chapin v. Dobson*, 78 N. Y. 74; *Welz v. Rodius*, 87 Ind. 1; *Singer Mfg. Co. v. Forsyth*, 108 Ind. 334.

In *Singer Mfg. Co. v. Forsyth*, *supra*, Mitchell, J., speaking for the court, says: "The rule that a formal written contract, which appears to be complete, will be presumed to be the repository of the final intentions of the parties, in regard to the subject-matter of the agreement, and that it excludes proof of any prior or contemporaneous parol stipulations which would contradict the writing, is abundantly settled, and

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should not, on account of its importance, be relaxed in any degree.”

The learned court quotes from Lord Coke in *Rutland's Case*, 5 Coke's R. 26: “It would be inconvenient, that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the parties should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory. And it would be dangerous to purchasers and farmers, and all others in such cases, if such nude averments against matter in writing should be admitted.”

Proceeding, the learned judge says: “The rule, however, has no application to a case in which it appears from the writing itself that it does not contain the whole agreement between the parties, nor does it operate to exclude proof of collateral or superadded agreements, provided the agreements so sought to be proved be not inconsistent with the writing. In such cases parol evidence of the collateral matter is admissible to the extent that it does not specially add to, or contradict, or where it is necessary to complete, the original contract.”

In the case last mentioned, the court held that parol proof was admissible because the bond sued on, failing to state any consideration, was incomplete on its face, and because the irresistible implication arising upon the face of the bond, indicated that it was collateral to some other contract which must be ascertained in order to determine the subject-matter to which it should be applied and the consideration upon which it was made.

We understand the authorities to go to the extent that the existence of any separate oral agreement on which a document is silent and which is not inconsistent with its terms, or where the written instru-

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ment itself is incomplete or ambiguous, parol evidence may be introduced to prove such contemporaneous oral agreement. This doctrine, carried to its utmost limits, was applied in *Welz v. Rodius, supra*, where the authorities illustrating the rule are collected.

The effect of the rulings of the court below complained of was to permit the admission of oral testimony to vary the terms of a written contract, which was complete in itself and free from ambiguity, and this ruling, in the opinion of the court, was error.

Reversed, with instructions to sustain the motion for a new trial.

THE PACIFIC MUTUAL LIFE INSURANCE COMPANY
v. TURNER.

[No. 2,221. Filed May 26, 1897.]

PLEADING.—*Complaint on Accident Policy.*—In a complaint on a policy of accident insurance an allegation that “the said plaintiff has fully complied with his contract with said defendant to be performed by said plaintiff,” sufficiently alleges that plaintiff had performed all the conditions on his part. *p. 645.*

APPEAL AND ERROR.—*Harmless Error.*—Error, if any, in sustaining a demurrer to paragraphs of answer is harmless where all the facts set up therein are provable under the general denial which is also pleaded. *p. 646.*

SPECIAL VERDICT.—*Failure to Find Material Fact.*—*Accident Insurance.*—A special verdict in an action on a policy of accident insurance which did not find the period for which the policy was issued, or that the policy was in force at the time of the accident, is not sufficient to sustain a judgment. *p. 646.*

From the Monroe Circuit Court. *Reversed.*

H. C. Duncan and I. C. Batman, for appellant.

W. M. Loudon and T. J. Loudon, for appellee.

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BLACK, J.—The appellee sued the appellant upon a policy of accident insurance. A demurrer to the complaint for want of sufficient facts was overruled. It is suggested by counsel for the appellant that it was not sufficiently shown by the complaint that the appellee had performed all conditions precedent contained in the policy. The statute, section 373, Burns' R. S. 1894 (370, Horner's R. S. 1896), provides: "In pleading the performance of a condition precedent in a contract, it shall be sufficient to allege, generally, that the party performed all the conditions on his part. If the allegation be denied, the facts showing a performance must be proved on the trial."

The complaint before us contained an allegation as follows: "The said plaintiff has fully complied with his contract with said defendant to be performed by said plaintiff."

It is insisted on behalf of the appellant that this is not a sufficient compliance with the statute to relieve the appellee from making specific allegations of performance with the particularity required at common law.

It is not necessary to use the exact words of the statute in pleading performance of conditions precedent; it is sufficient if language of substantially the same meaning be employed. In *Aetna Ins. Co. v. Kittles*, 81 Ind. 96, the use of the words "duly fulfilled" instead of the statutory word "performed" was held sufficient.

It is not a forced construction of the language of the complaint to regard it as alleging that the plaintiff acted in accordance with the requirements of the contract to be performed by him. He could not have fully complied with his contract to be performed by him without having performed all its conditions on his part.

No other objection to the complaint is suggested on behalf of the appellant. This objection does not seem to be sufficient for the reversal of the judgment.

The appellant answered in four paragraphs, the first being a general denial.

The court sustained a demurrer to the second, third and fourth paragraphs. In these rulings there was no available error; for all of these paragraphs simply alleged that the appellee's injury was occasioned by other causes than that alleged in the complaint, and, therefore, if the matters alleged in the answers constituted defenses, they could have been proved under the general denial.

There was a special verdict. The court overruled the appellant's motion for judgment thereon in its favor, sustained a like motion of the appellee, and overruled the appellant's motion for a new trial.

The special verdict showed that the appellant, at a date mentioned, issued its policy of insurance, having a specified number, to the appellee. It also showed that the accident by which the appellee was injured occurred at a date some months later. It did not state the period for which the policy was issued, nor show that the policy was in force at the time of the accident in question.

Because of such failure to state a material fact, the verdict did not show the appellee to be entitled to recover. Other objections made to the verdict need not be discussed, as they probably will not again arise.

We are of the opinion that justice requires the granting of a new trial. Therefore, the judgment is reversed, and the cause is remanded for a new trial.

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CLINE v. GOULD.

[No. 2,294. Filed May 26, 1897.]

APPEAL.—Dismissal for Failure to File Brief.—An appeal that has been dismissed for failure of appellant to file brief within sixty days as required by rule XIX of Appellate Court, will not be reinstated on the ground that appellant's attorney charged with the duty of preparing such brief was sick and unable to prepare the same, it not being shown why an extension of the time for filing brief was not applied for.

From the Madison Superior Court. *Petition to reinstate appeal overruled.*

D. W. Wood, W. S. Ellis and Goodykoonts & Ballard, for appellant.

Miller, Winter & Elam, for appellee.

HENLEY, J.—This cause was dismissed under rule XIX of this court, which is as follows:

“Where a cause is submitted on call, by agreement, or upon notice the appellant shall have sixty days in which to file a brief, and if a brief is not filed within the time limited, the clerk shall enter an order dismissing the appeal, unless the appellee shall have filed with the clerk a written request that the cause be passed upon by the court. If cross-errors are assigned, the party assigning them shall have the same length of time to file a brief thereon, and if a brief is not filed within the time the cross-errors shall be struck out.”

Appellant now seeks, by motion, to reinstate the appeal. The affidavit of one of the attorneys of record for appellant, filed with the motion to reinstate, sets up, in substance, the following facts: That affiant, David W. Wood, is one of the attorneys for the appellant in the above entitled cause; that this cause

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was submitted on the 14th day of December, 1896, and that appellant's brief was filed in the clerk's office some time about the 15th, 16th or 17th of February, 1897, the exact date of which affiant is not able to state; that affiant had been designated by his co-counsel as the attorney to prepare and file the appellant's brief in this cause, and that pursuant to said understanding he began the preparation of said brief along about the last week in January, 1897, and after having it partly prepared was taken down with an attack of la grippe, and was unable to be at his office for more than ten days; all of which was prior to the expiration of the sixty days; and that affiant says that his partner, W. S. Ellis, was, during said time, also sick, and away from the office, and that neither affiant nor his partner were able to complete said brief; immediately after being able to get to his office, affiant completed the brief and sent it to the clerk of the court to be filed; that affiant and his partner are the senior counsel in this cause and brought appellant's action for him; that the firm of Goodykoonts & Ballard were retained in said cause after the filing of the amended complaint, and never at any time took a leading part in the management of said cause, but only assisted at the trial; and that said last named firm took no part in the briefing of this cause in this court; that the failure to file said brief within the sixty days given by the rule was unavoidable and not in any way the result of the fault or neglect of this affiant, but solely on account of his and his said partner's sickness; and that appellant has a meritorious cause of action.

The rule quoted is one that allows a reasonable time for the attorneys to prepare and file their briefs, and at the same time it insures to a litigant a speedy consideration of his case. If counsel for appellant, knowing the time within which they were re-

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quired to file their brief, had applied to this court for an extension of time, within which to file the same, and had properly brought the facts, as stated in the motion to reinstate, before the court in an application for an extension of time, the time would, no doubt, have been extended. The affidavit accompanying the motion to reinstate states no reason why an extension of time was not asked for. It is the practice of both this court and the Supreme Court to strictly enforce the rule dismissing appeals for a failure upon the part of counsel to file a brief within the time allowed therein. It is absolutely necessary, to insure the speedy determination of causes, that this be done.

The motion to reinstate is overruled.

JOHN V. FARWELL COMPANY v. NEWMAN ET AL.

[No. 2,859. Filed May 26, 1897.]

APPEAL.—Dismissal.—Where a cause has been appealed in vacation, and has been upon the docket for ninety days, and there has been no general appearance by appellee, it will be dismissed under rule XXXV of the Appellate Court.

From the Grant Circuit Court. *Appeal Dismissed.*

J. A. Kersey and Harvey & De Wolf, for appellant.

H. J. Paulus, for appellees.

COMSTOCK, J.—Appellees entered a special appearance for the sole purpose of moving the court to dismiss this appeal for want of jurisdiction of the persons of appellees. Notice of the motion has been duly given. Two modes of appeal are provided by statute, section 652, Burns' R. S. 1894 (640, Horner's R. S. 1896), provides for an appeal after term. Section

650, Burns' R. S. 1894 (638, Horner's R. S. 1896), provides for an appeal during term.

"When an appeal is taken during the term at which judgment is rendered, it shall operate as a stay of all other proceedings on the judgment, upon an appeal bond being filed by the appellant, with such penalty and surety as the court shall approve, and within such time as it shall direct. * * * The transcript shall be filed in the office of the clerk of the supreme court within sixty days after filing the bond."

The filing of the bond within the time fixed is mandatory.

Section 248, of Elliott's App. Proced. reads, "It is evident that the framers of the statute in providing for an appeal in term intended to designate all the steps that should be taken to perfect such an appeal, not to provide merely some of the steps that should be taken by the appellant. If one of the steps designated is important, so are they all, and the courts have as little power to dispense with one step as with all. What the statute requires must be done, or there is no appeal in term. * * * It dispenses with the important element of notice which is required in all other cases, but in doing this substitutes a system of procedure requiring that all the acts specified shall be performed." See, also, sections 246, 247, 374 and 375, of the same work.

The record in the case at bar discloses that judgment was rendered in the lower court November 6, 1895. The motion for a new trial was overruled January 22, 1896, and on the same day appellants prayed an appeal to this court and ninety days in which to file its bill of exceptions. No penalty of a bond was fixed, no surety provided, no time fixed in which to file a bond. The transcript was filed in the clerk's office of the court, January 10, 1897, within three days

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of a year of the time the motion for a new trial was overruled, and final judgment rendered.

The requirements of the statute not having been complied with, the appeal in term was not perfected, and will be deemed to be abandoned.

An appeal after term is, according to the decision of the Supreme Court in the recent case of *Tate v. Hamlin* (Ind. Sup.), 41 N. E. 356, perfected by filing in the clerk's office of the Supreme Court a transcript with an assignment of errors thereon. The notice is there held not to be essential to the perfecting of the appeal.

The present appeal must be considered as taken after term, and to have been perfected by filing the transcript and assignment of errors within the time allowed by law.

Rule XXXV of this court reads as follows: "Where a cause appealed in vacation has been on the docket ninety days or more, and there is no appearance by the appellee, and no steps have been taken to bring him into court; or where a notice has been issued and proves ineffectual from any cause, and no steps are taken for more than ninety days after the issuance of such ineffectual notice to bring the appellee into court, the clerk shall enter an order dismissing the appeal."

There has been no general appearance by appellee, and no steps have been taken to bring him into court. The clerk is, therefore, directed to enter an order of dismissal for failure to comply with this rule.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD
COMPANY v. GROSSMAN.

[No. 2,024. Filed March 10, 1897. Rehearing denied May 26, 1897.]

SPECIAL VERDICT.—*Interrogatory to Jury, When Improper.*—In an action against a railroad company for damages caused by fire escaping from defendant's right of way, an interrogatory to the jury, under the act of March 11, 1895, which asks if the fire which started in combustible materials on the right of way escaped, without fault or negligence of the plaintiff to plaintiff's land, and burned and damaged his property as described in the complaint, is improper as embracing more than a single fact and also as calling for a conclusion. *pp.* 654, 655.

RAILROADS.—*Negligence.*—*Fire Escaping from Right of Way.*—A special verdict which finds that combustible materials were permitted by a railroad company to accumulate and remain upon its right of way, that it was an exceedingly dry time and there was a brisk wind blowing towards plaintiff's land from the adjoining right of way; that sparks from a passing engine set fire to the material, and the company negligently permitted it to escape to plaintiff's land and destroy his property, is sufficient to sustain a judgment for plaintiff. *p.* 655.

SAME.—*Fire Escaping from Right of Way.*—*Duty of Adjoining Landowner.*—A landowner adjoining a railroad right of way who uses his premises in the ordinary and customary manner, is not guilty of contributory negligence for failing to resort to special or extraordinary precautions to prevent the destruction of his property from fire happening through the negligence of the railroad company. *p.* 656.

From the Marshall Circuit Court. *Affirmed.*

M. A. O. Packard, Chas. Drummond and Morris, Bell, Barrett & Morris, for appellant.

William B. Hess, for appellee.

ROBINSON, J.—Appellee recovered a judgment for damages resulting from fire, alleged to have been negligently started by appellant, and negligently permitted by appellant to go upon and destroy appellee's property. The complaint was held good against a de-

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murrer, and the cause was put at issue by the general denial. The jury returned a special verdict, and final judgment was rendered for appellee over appellant's motions for a *venire de novo* and for judgment in its favor.

Appellant assigns as error the overruling of the demurrer to the complaint and the motions for a *venire de novo* and for judgment.

Appellant's counsel say, in their brief, they think the complaint sufficient, and do not discuss the ruling on the demurrer.

It is insisted that the special verdict is defective in that the jury failed to find that appellee was free from fault or that appellant was guilty of any negligence. Upon these subjects the special verdict is as follows: "Int. 3. Had the defendant, by its employes, cut grass and weeds growing on its right of way north of its track adjacent and adjoining the said land of plaintiff, leaving it remain there for some days before the fire? Ans. Yes. Int. 4. Did the defendant carelessly and negligently permit and suffer dry grass and rubbish and weeds and other combustibles to accumulate and remain along and upon its rights of way adjacent and adjoining the said land of the plaintiff at the time of said fire? Ans. Yes. Int. 5. If you answer yes to the foregoing interrogatory, then did sparks escape from the defendant's locomotive engine attached to a freight train going east on its said railroad, on or about the time set forth in the plaintiff's complaint, and set fire to said dry grass, weeds, rubbish, and other combustible material? Ans. Yes. Int. 6. If you answer yes to the preceding interrogatory, did said fire, through the medium of such combustible materials, without any fault or negligence of the plaintiff, escape and run off from said defendant's right of way to the plaintiff's said land and burn and

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damage and destroy his property as described in the complaint? Ans. Yes. * * * * * Int. 23. Did said defendant carelessly and negligently permit said fire to escape from its right of way onto the plaintiff's said land at the time mentioned in his complaint? Ans. Yes. Int. 24. Was it exceedingly dry at the time of the fire described in the complaint? Ans. Yes. Int. 25. Was there a light or brisk wind from the southwest at the time of said fire? Ans. Brisk. Int. 26. Is the plaintiff's said land on the north side of the defendant's right of way and adjacent and adjoining the defendant's right of way? Ans. Yes. Int. 27. Did the fire which plaintiff alleges destroyed the property described in the complaint start on the defendant's right of way? Ans. Yes. Int. 28. If you say yes to the preceding interrogatory, state the point on the defendant's right of way where said fire started. Ans. About two hundred feet west of plaintiff's west line. Int. 29. What started the fire on defendant's right of way? Ans. A spark from the defendant's engine. * * * Int. 32. State specifically, if you say said fire started on the right of way, in what combustible matter said fire started. Ans. Grass and weeds. Int. 33. State specifically how said fire got onto the real estate described in the complaint. Ans. From a fire that originated on the defendant's right of way. * * * Int. 37. What was the value of the plaintiff's labor in suppressing the fire complained of in his complaint? Ans. Five dollars. * * * Int. 40. Had not defendant's right of way, where it is alleged said fire started, been cleaned off and freed from rubbish and combustible matter in the spring of that year? Ans. Yes."

It is argued that interrogatory six and the answer are vague, and that the answer is a conclusion and not a fact.

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We do not think the interrogatory is a proper one under the act of 1895. It is not possible to tell whether the jury intended to say that the fire escaped from the railroad right of way onto plaintiff's land and destroyed his property, or whether it was the jury's conclusion that the fire escaped without plaintiff's fault, or whether it was their conclusion that it destroyed plaintiff's property without his fault. If the jury found, in other parts of the verdict, that the fire originated on the railroad right of way and that it escaped to appellee's land and destroyed his property, all of which they did find in answer to other interrogatories, then the only part of the question left would be the fault or negligence of appellee to which the answer is simply a conclusion. *Board, etc., v. Bonebrake*, 146 Ind. 311.

The interrogatory embraces not only more than a single fact, but also calls for a conclusion, and should not have been submitted to the jury, although it is not available error.

When it is shown that combustible material, liable to be set on fire by sparks from passing locomotives, was allowed to accumulate and remain upon appellant's right of way, that it was an exceedingly dry time, that there was a "brisk wind" blowing towards appellee's land which adjoined appellant's right of way, that sparks from a passing engine set fire to such material on appellant's right of way, from which place appellant negligently permitted it to escape to appellee's land and destroyed his property; such facts show that appellant was negligent, and that such negligence was the proximate cause of the injury to the appellee. *Chicago, etc., R. W. Co. v. Burger*, 124 Ind. 275; *Pittsburg, etc., R. W. Co. v. Jones*, 86 Ind. 496.

It is argued that the verdict fails to show that the appellee did anything to prevent the burning of his

property that would establish his own freedom from fault or negligence.

In *Gulf, etc., R. W. Co. v. Johnson*, 54 Fed. 474, it is said: "It is very well settled that it is not contributory negligence for the occupant of land adjoining a railroad to leave it in its natural state; and a farmer using his premises in the ordinary and customary manner is not guilty of contributory negligence for failing to resort to special or extraordinary precautions to prevent the destruction of his property from fire happening through the negligence of a railroad company." See *Pittsburg, etc., R. W. Co. v. Jones*, *supra*; *Philadelphia, etc., R. R. Co. v. Hendrickson*, 80 Pa. St. 182, 21 Am. Rep. 87.

It does not appear that appellee was using his property other than in the ordinary and usual way. It was seeded to clover and grass, which had been cut, and was there in windrows. The finding shows the damage was not limited to the burning of the windrows, but also the destruction of the roots of the clover and grass. He had the right to enjoy his property in the ordinary manner. And while he was charged with the duty of saving his property from destruction if it could be saved, the law does not compel him to stand over it to protect it from the negligence of the appellant. The fact that the special verdict fails to show that appellee did anything to prevent the escape of the fire to his premises cannot be construed to be a failure to find his freedom from fault. It appears, from the special verdict, that the appellee did expend labor in suppressing the fire. It thus appears he did make an effort to save his property from destruction.

The appellee was not bound to use unusual precautionary measures to protect his property from in-

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jury at the hands of appellant. *Chicago, etc., R. R. Co. v. Smith*, 6 Ind. App. 262.

Thus it is said in *Chicago, etc., R. R. Co. v. Kern*, 9 Ind. App. 505, "The owner of land, in such cases, is not bound to employ the unusual precautionary measure of removing the dry grass and stubble on his land adjacent to the right of way of the railroad, in anticipation of the fact that the railroad company may negligently set fire to the inflammable material on the right of way, or that the company may negligently permit such fire to escape from the right of way onto his premises." *Chicago, etc., R. R. Co. v. Barnes*, 2 Ind. App. 213.

Taking the special verdict as a whole, we think it is sufficient to sustain the judgment in appellee's favor. We find no error in the record for which the judgment should be reversed.

Judgment affirmed.

THE CINCINNATI, HAMILTON AND INDIANAPOLIS RAILROAD COMPANY v. REVALEE.

[No. 2,029. Filed Feb. 23, 1897. Rehearing denied May 26, 1897.]

RAILROADS.—Injury of Passenger Alighting from Train.—Contributory Negligence.—A passenger on a railway train, who goes upon the platform of the coach while the train is going very slowly preparatory to stopping at her destination, and when the train has stopped attempts to alight, but in doing so is thrown upon the station platform by a sudden starting of the train without warning, is not, as a matter of law, guilty of contributory negligence. *pp. 660, 661.*

EVIDENCE.—Variance Between Pleading and Proof.—In an action by a passenger for personal injuries, proof that such passenger, while standing on the lowest step of a car waiting for the train to stop, was thrown from the car by a sudden starting of the train, is not a material variance from a complaint alleging that the train had

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stopped but started with a sudden jerk before she had the time to alight, and threw her upon the platform. HENLEY and WILEY, JJ. Dissenting. pp. 668-672.

From the Fayette Circuit Court. *Affirmed.*

R. D. Marshall and T. M. Little, for appellant.

Reuben Conner and J. M. McIntosh, for appellee.

BLACK, J.—The appellee sued the appellant to recover damages for personal injuries. The complaint, omitting the introductory matter, about which there is no question, alleged, in substance, that on the 29th day of September, 1894, the appellee purchased of the appellant's passenger ticket agent at Connersville, a round trip ticket from that place to Lockland, Ohio, and in consideration of the price paid, etc., the appellant agreed and was bound, as a common carrier, to carry appellee safely, etc.; that appellee on said day took passage at Connersville on one of appellant's regular passenger trains, which, by the rules of the appellant and by the schedule prepared by it for the information of the traveling public and its agents, was, on that day, scheduled to stop for receiving passengers on said train, and allowing passengers to alight from it at both of said places; that the conductor, or agent of the appellant, in charge of the train accepted that portion of the ticket for the appellee's fare from Connersville to Lockland; that the appellant's agent in charge of the train, when it was within one-half mile of the town of Lockland, notified appellee that the train was approaching that town, and told her to be in readiness to get off, as the train was late and would not stop long at appellant's station; that appellee had with her, and in her charge, her infant child, which, on account of its tender years, was not able to walk or take care of itself; that as the train

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approached the appellant's station at said town, appellant's agents in charge of the train called out in the coach, where appellee was riding, the name of appellant's station at said town of Lockland, notifying the passengers within said coach that the train would stop at Lockland, and that it was the next station at which it would stop; that as soon as said station was so called, the appellee prepared to leave the train; that as it approached said station the train decreased its speed to such an extent that when it reached the station it almost stopped; that appellee, with her child in her arms, was at the door of the coach in which she was riding when the train had reduced its speed until it almost stopped, as aforesaid, and then stepped out on the platform of the coach, at which time the train wholly stopped at said station, and the appellee immediately, with her said child in her arms, attempted to alight from said train; that she, with reasonable expedition, immediately, and with due care, and without any fault on her part, descended the steps of said coach; that just as she reached the last or bottom step of said coach, and was just in the act of stepping therefrom, in her attempt to alight from said train, as aforesaid, the appellant's agents in charge of the train, without warning or caution to her, and without giving her a reasonable time to alight from said train, unlawfully and negligently started said train with a violent jerk, by reason of which she was thrown, without any fault or negligence of hers, off said step to the stone platform or pavement which the appellant had provided at said station for its passengers to alight upon; that she was thrown in so violent a manner, and with such force, that her head, arms, back, and shoulders struck upon said pavement with such force that, etc., her injuries being described. It is further alleged, that the train did not stop at

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said station long enough for her to alight in safety, but, on the contrary, it barely came to a stop until it was started with a violent jerk, throwing her off, as aforesaid; that the agents of the appellant in charge of the train, long before said station was reached, knew that appellee had said small child with her, and that it would be necessary for her to carry said child from the train, and, knowing this, appellant unlawfully and negligently failed to have any agent or servant at the proper place to assist the appellee in alighting from the train; that the appellee was without fault on her part in all things, and the injuries which she sustained were all the result of the carelessness and negligence of the appellant, as aforesaid; that by reason of said injuries she had sustained damages in the sum of \$5,000.00. Wherefore, etc.

A demurrer to the complaint for want of sufficient facts was overruled. The appellant answered by general denial. Upon trial of the cause by jury, a general verdict for the appellee for \$2,500.00 was returned.

The appellant's motion for a new trial was overruled, and judgment was rendered on the verdict.

It is contended on behalf of the appellant that the complaint shows that the appellee's negligence contributed to her injury. It is urged that for a woman to go upon the platform or down on the steps with a child two years old in her arms, when the train is in motion, is negligence. The complaint alleges that appellee was at the door when the train had reduced its speed until it almost stopped; that she then stepped out on the platform, "at which time the train wholly stopped," etc. If the complaint shows that the appellee went upon the platform while the train was in motion, it does not show that she descended the steps and attempted to alight while it was in motion. It shows with sufficient certainty that she descended the

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steps and attempted to alight when the train stopped, and that thereafter the train was started with a violent jerk, by reason of which she was thrown off the step to the stone platform; that the train did not stop long enough for her to alight in safety, but it barely came to a stop until it was started with a violent jerk. It does not appear from the complaint that the appellee was injured while she was upon the platform, or that her going upon it caused her injury, or contributed directly to it. If she had remained there, she would have been in a place of safety. We cannot say, then, that it was negligence for her to go out upon the platform.

The particular allegations of the complaint are not so inconsistent with its general allegations that the appellee was without fault or negligence, as to overcome the effect of those general allegations. The objection made to the complaint in argument does not seem to be well taken.

The sufficiency of the evidence to sustain the verdict is questioned by appellant. The evidence showed that the appellee was accompanied by her father and his daughter-in-law, and appellee's child, two years and about two months old; that appellee went upon the platform of the car and down to its lowest step with her child upon her left arm; that her sister-in-law and father followed her from the car to the platform thereof, and were still upon the platform when she was injured.

There was a wide difference between the evidence introduced by the appellant and that produced by the appellee, as to the manner in which she received her injury.

The evidence of the appellant tended to prove that the train stopped at the station, in front of the depot, and remained there from one minute and a half to

three minutes; that while it so remained a number of passengers alighted and other passengers went upon the train; that trainmen upon the depot platform helped ladies on and off the train, and that a brakeman was yet on the depot platform when the appellee fell; that the conductor, who was on the depot platform unloading and loading passengers, having seen that nobody was coming out, asked the brakeman, who was toward the rear, how it was back there, and he having said "All right," the conductor gave the signal to go ahead, and the train started to leave the station, the conductor getting on as soon as it started; that after it had started, and while it was in motion, the appellee and her sister-in-law and father came out of the car to its platform; that the appellee went down the steps of the car platform to the lowest step with her child upon her arm, and stepped off upon the depot platform, which was a cement walk, and fell upon it; that a brakeman who was standing on the depot platform, saw the appellee come out of the car and step down on the platform as if to get off; that he halloed to wait and not jump off, and gave a signal to stop the train; that the train stopped after having run the distance of from the length of a car to three or four car lengths, but before it stopped, and after it had run about half the length of a car or a car's length, appellee jumped off; that when she did so the train was moving about as fast as a man can walk at an ordinary gait, or about four miles an hour; that the car step, from which she jumped, was about a foot above the depot platform; that the appellee took hold of the hand rail on the coach and swung herself off and fell backward; that the brakeman reached out both hands and caught her, as she fell, by her shoulders; that her weight brought him down and her head hit his knee; that he picked

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up the child and assisted appellee to the ladies' waiting room.

The evidence introduced by the appellee tended to prove that she had previous knowledge of the locality; that before reaching the station a trainman announced it in the car and told the passengers to be prepared, and that the train was a little behind time; that when the train whistled for the station she took her child on her left arm and went to the front door, her father and her sister-in-law following; that she opened the door, and went out upon the platform; that the train was slowing up when she opened the door, and it slowed up until she thought it was ready to stop, and she stepped down to the lower step and stood with her child on her left arm and held on to the projecting iron on the side of the car with her right hand, and had her right foot extended ready to make the step off when the train would stop; that it did not stop, but started up with a jerk, which made her lose her balance and threw her, and when she knew she was going she made the jump to save herself from falling, and alighted upon a cement platform on the back of her head and left shoulder, arm and hip; that when she fell she knew that some one, the conductor or brakeman, hallooed at her, saying, "Don't jump, lady," or "Woman, don't jump there, you will get hurt;" that she was then too far gone, had lost her balance and had started to fall; that when she stepped down, the train was slowed up so that she thought it would stop every minute; that when she started down the steps the train was slowing up so that a person would think it would stop, that it was just barely moving; that at the time of her injury she was a stout, hearty woman, her weight averaging from one hundred and seventy-five to one hundred and eighty pounds; that when she got down on the lower

step the train was, "in a manner," stopped, and she expected every second for it to stop, but it did not stop still; that, at some time after the party had gone out of the car, her father told her she had better be careful; that the train was stopped by signal; that it came to a stop after passing the depot, and the father and sister-in-law then got off. One of the appellee's witnesses, her father, nearly seventy-eight years old, whose sight and hearing were bad, testified, among other things, that when the appellee went out upon the platform the train was running slowly; that it was catching up every once in a while, and would go ahead; that when she went down on the lower step the train was running slowly, but it would jerk up; that as it was running it would jerk up and then run out again, that is, it would run a little further, and then jerk up. The appellee's sister-in-law testified, that as the train slackened its speed, appellee went to the step, and as it slowed up it went very slow, and she stood there waiting for the train to stop, with her baby on her left arm and holding with her right hand to the iron at the side of the car; that it came very near stopping, and she stood there ready to get off; and when she was standing there waiting for it to stop, the train started up with a jerk and kept going faster and faster; and that she fell off with the jerk.

It was testified by the appellee, that when she stepped down on the step, the train was running in such a manner that it was so slow that anybody would go down to make the step off as soon as it would stop; that "it was so slow that you could just barely see it move, and that is all, and I got down onto the step."

In *Reibel, Adm'x., v. Cincinnati, etc., R. W. Co.*, 114 Ind. 476, the general rule was stated to be, that passengers who are injured while attempting to get upon

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or off a railroad train while it is in motion cannot recover for their injuries; that to this general rule some exceptions have been recognized, one of which is, when the passenger is either ordered or invited by the company or its agents to get on or off, notwithstanding the motion of the train; but that a passenger must not attempt to get on or off a train which is in motion, if it be obviously dangerous to make the attempt, although he may have been advised or even ordered to do so by the servants of the company, when he is a person of ordinary intelligence and not acting under constraint; that while it is the plain duty of a railroad company to stop its train at the place of a passenger's destination long enough to permit him to get off with safety, the fact that a train is about to pass such a place of destination without stopping does not justify the passenger in incurring serious risk by jumping from the train.

In *Louisville, etc., R. R. Co. v. Crunk*, 119 Ind. 542, 553, it was said: "We cannot adhere to the doctrine that the attempt to voluntarily leave a moving train, regardless of the speed and circumstances under which the attempt is made, is negligence *per se*."

In the case last mentioned it was said, also, "The fact that a person voluntarily alights from a moving train is not a conclusive presumption of negligence on his part. The rate of speed the train has acquired, the place, and all the circumstances connected with the alighting, are to be taken into consideration in determining whether or not the person was guilty of negligence on his part in leaving or attempting to leave the train."

Pennsylvania Co. v. Marion, 123 Ind. 415, 7 L. R. A. 687, 18 Am. St. 330, was an action for damages for injury suffered by the plaintiff in stepping off a slowly moving train. It was held that the question whether

alighting from a moving train constitutes negligence or not, is a fact to be determined by the jury trying the cause, taking into consideration all the circumstances in connection with the alighting. In that case, the evidence, which was held sufficient to support the verdict against the railroad company, showed as to the rate of speed, that the train was moving at the rate of not over two miles an hour, or at the speed of an ordinary slow walk of a person.

In *Louisville, etc., R. R. Co. v. Bean*, 9 Ind. App. 240, the court held that it is not necessarily negligence *per se* for a passenger to step from a moving train, but it is only where the facts are undisputed, and but one inference can be reasonably drawn therefrom, that the court will adjudge negligence or contributory negligence, as a matter of law.

In *Toledo, etc., R. R. Co. v. Wingate*, 143 Ind. 125, the complaint showed that when the passenger, a woman, acquainted with the locality, loaded with many bundles, reached the door, the car was moving with a gentle motion; that she went upon the platform of the car, and then finding that the car was still moving and more rapidly, and not seeing any one to assist her, she was stricken with dismay and fright, and seized with fear that she would be carried past the station and away from home, and feeling that she must get off, and yet believing and expecting that the conductor or other trainmen would meet her, take her bundles and packages and aid her in alighting, as was their duty and custom with female passengers, she proceeded down the steps of the car, etc.; that at or about the time she reached the lower step of the car, the speed of the train was negligently and suddenly quickened, whereby she was thrown upon the depot platform, which was twenty-six inches below

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the lowest step of the car. It was held that the complaint showed contributory negligence.

In *Cincinnati, etc., R. R. Co. v. McClain* (Ind. Sup.), 44 N. E. 306, it was held that a passenger wishing to alight at a certain crossing, the conductor having told him that he could get off there without danger, was guilty of negligence in going upon the lower step of the platform at night, and while the train was running at a speed of 11 or 12 miles an hour.

In *Cleveland, etc., R. W. Co. v. Moneyhun, Gdn.*, 146 Ind. 147, it was held that a passenger, who was a person having capacity to be guilty of contributory negligence, was, as a matter of law, negligent in going upon the lowest step of the car and standing there with his back toward the platform and his head leaning outward, to vomit, while the train was running at the rate of twenty-five miles an hour, the jury finding that it was dangerous for him to do so. In the case last mentioned, the question as to contributory negligence arose under a special verdict, and it was said to be a well settled proposition in this State, that whenever, under the facts disclosed by a special verdict, the question is presented either as to the negligence of the defendant, or as to whether the plaintiff was without fault, and two inferences may be reasonably drawn as to either of said ultimate facts, one in favor and the other against, then the determination of such a fact is within the province of the jurors, and their finding will be accepted by the court as conclusive; but if the facts found are such that the court can adjudge, as a matter of law, that the injured party was or was not guilty of contributory negligence, then the finding of such ultimate fact, whatever it may be, will be disregarded by the court.

In the case at bar, regarding, as we must, the evi-

dence most favorable to the appellee, which it was within the province of the jury to accept as showing truly the facts of the injury, we are presented with the question whether the court or the jury should determine, upon those facts, the question as to contributory negligence.

We need not again recite those facts, or any of them. Regarding them all together, and considering them in connection with the authorities, we are of the opinion that the question as to whether the evidence most favorable to the appellee did or did not show her to be free from contributory fault was one for the jury to determine under proper instructions from the court.

The question as to contributory negligence determined by the jury, under the evidence produced by the appellee, was not one of voluntarily alighting from a moving train, but one of going upon the lower step of a slowly moving car, and, the car still slowly moving, standing there and waiting with the intention of alighting when the train should cease to move. The difference between such cases is not an insignificant one.

It is earnestly argued by the appellant that the trial proceeded upon a different theory from that set out in the complaint, which alleged that the train stopped, while the appellee's evidence upheld the theory that the train did not stop.

It devolves upon us to inquire whether this difference between the evidence and the statement in the complaint constitutes a failure of proof.

In *Waldhier v. Hannibal, etc., R. R. Co.*, 71 Mo. 514, the action being for negligence in having and using insufficient machinery and in running and managing its railroad and cars, it was held that the plaintiff could not recover upon proof that the injury was occasioned by a broken frog.

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In *Price v. St. Louis, etc., R. W. Co.*, 72 Mo. 414, where the fault of the defendant was in not stopping the motion of the train a reasonable time to admit of the plaintiff's leaving the cars, whereby he, in leaving the train, was thrown with violence upon the platform of the depot, it was held that the plaintiff could not recover upon proof of the company's failure to keep the platform lighted.

Where the alleged negligence of the defendant was its failure to blow a whistle, it was held that evidence that the whistle was defective was not admissible. *Gulf, etc., R. W. Co. v. Scott* (Tex. Civ. App.), 27 S. W. 827.

In *Birmingham, etc., R. W. Co. v. Clay*, 108 Ala. 233, 19 South. 309, the third count of the complaint alleged that while a train had stopped for receiving and putting off passengers, the plaintiff's intestate and other passengers seeking to board said train, got upon the platform of one of the cars; that while he was on said platform, and before he had time and opportunity to get inside said car, it was quickly put in motion, and he was thereby thrown from his balance and caused to fall off said platform and under the wheels of the car he was seeking to enter, and he was thereby run over and killed; that his death was caused by the negligence of the defendant in not allowing the train to remain stationary long enough for him to get safely on the same, and in starting the train too suddenly, so as to throw him off said platform, and in failing to discover his peril, while on the platform, from said car being put in motion; in putting said train in motion while he was in a place of danger which might have been discovered and averted by proper care and watchfulness on the defendant's part; and in failing to keep a proper lookout to see that he had reached a place of safety on the train before it was put in motion.

It was said by the court: "There was no proof that intestate was ever on the platform of the car, and was thrown therefrom, but all the proof shows he had, attempting to board the train, ascended no further than the first or lowest step of the car, and was thrown from it. There was a variance, therefore, in the allegations of the third count, and the proof."

In *Cleveland, etc., R. W. Co. v. Wynant*, 100 Ind. 160, the complaint charged that the plaintiff's team of horses became frightened at an empty box car, negligently and unlawfully suffered by the defendant to remain upon the public highway, and ran away, etc. There was no evidence that the horses became frightened at the car, but there was evidence that they became frightened at a noise in a car that was on the railroad out in the public highway. It was held that there was a failure of proof.

In *Cincinnati, etc., R. R. Co. v. McClain, supra*, it was alleged in the complaint that the passenger was informed by the conductor that the train would stop at the crossing of the Belt Railroad, and that he could get off without danger. It appeared by the answers of the jury to interrogatories that the accident did not happen at the crossing, at the point where the train usually stopped, but happened at a point about 1600 feet east of the crossing; that the train did come almost to a stop at the usual stopping place, 250 feet east of the crossing. It was said by the court: "Whether it could be said that the switches, 1600 or 1800 feet east of the Belt, were 'at the crossing of the Belt Railroad,' in such a sense as to make the complaint good for an injury caused at the switches, but which was alleged to have been caused at the crossing where the train usually stopped, at a point 250 feet from the Belt road, may admit of grave doubt. * * *

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No rule is better established than that a plaintiff must recover according to the allegations of his complaint, or not at all. He cannot recover on evidence which makes a case materially different from the case made by his pleadings."

Neither in the complaint, in the case at bar, nor in the evidence produced by the appellee, was there any matter relating to a defect in the locomotive or train or track or landing place. There was no difference between the complaint and the evidence as to time, place, surroundings, or persons. The complaint and the evidence both showed the cause of the injury to be the failure of the appellant to give the appellee an opportunity to alight in safety and the sudden starting up of the train with a jerk while she was upon the lower step of the car, her conduct in being there not being negligent, as a matter of law. Although the circumstances of her taking that position and standing there were described differently in the complaint and the evidence, yet the complaint alleged and the jury found that she was without fault in being there. Whether or not she was negligent in being there when the train started with a sudden jerk, was the important question relating to her conduct, and a slight difference in the two descriptions of the circumstances of her assuming the position could hardly be material.

The proximate cause of the appellee's injury was not her going down upon the lower step, or her standing there, while the train was moving slowly, nor was it the slow motion of the train while she went down the steps, or while she stood upon the lower step; but the wrongful and sudden jerk, which threw her off her balance and caused her to fall, was the proximate cause. But for this she would not have received the injury, to which, as the complaint showed and the jury

found, no fault of her's contributed proximately. The complaint and the evidence most favorable to the appellee both showed as the proximate cause, the starting with a sudden jerk.

The appellant does not appear to have been misled as to its defense. If the evidence produced by the appellant had been accepted and relied upon by the jury as showing the true state of the case, it would have established as complete a defense to the cause of action shown by the appellee's evidence as to that shown by the complaint.

While, as we have heretofore suggested, the conduct of the appellee in that she was not in the very act of alighting voluntarily, but was standing on the step waiting for the train to cease to move, until, being thrown from her balance, she jumped to save herself, might be considered by the jury as affecting the question as to the prudence of her actions, yet the difference between her conduct described in the complaint and that shown by her most favorable evidence would not be such as to make the duty of the appellant toward her essentially different in the one case from what it would be in the other case; and the conduct of the appellant affecting the appellee, as shown by the evidence most favorable to her, was not essentially different from that stated in the complaint. Certainly such variances are not to be commended or encouraged, but, after some hesitation, we find ourselves unable to regard the evidence most favorable to the appellee as showing a case so essentially different from that stated in the complaint as to constitute a failure to prove the complaint in its general scope and meaning. Counsel have discussed other matters pertaining to the trial. The questions thus presented are of such a character that no useful purpose would be

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subservd by adding a discussion of them to what we have said.

We find no available error in the record.

Judgment affirmed.

HENLEY and WILEY, JJ., dissent.

SCOTT v. CAROTHERS ET AL.

[No. 2,237. Filed June 1, 1897.]

HUSBAND AND WIFE.—Burial Expenses of Wife.—Necessaries.—Suitable burial expenses for a deceased wife are necessities that should be furnished by surviving husband. p. 676.

SAME.—Abandonment of Wife, When Husband Liable for Necessaries.—Where a husband by his cruel and inhuman treatment forces his wife to abandon his home, he is legally bound to one who supplies her with necessities. p. 677.

SAME.—Abandonment.—Liability of Husband for Burial Expenses of Wife.—Where a husband by his cruel and inhuman treatment has forced his wife to abandon his home, and, while living separate and apart, she dies, the husband will be liable for her suitable burial expenses, although at the time of her death the wife was the owner of separate property more than sufficient to have paid such expenses. p. 678.

SAME.—Necessaries.—Antenuptial Contract.—An antenuptial contract which is simply directed to the disposition of the separate property of a husband and wife after death, does not exempt the husband from liability for suitable burial expenses upon the death of the wife. p. 678.

From the Lawrence Circuit Court. *Affirmed.*

R. A. Fulk and *Edwin Corr*, for appellant.

J. E. Henley and *J. B. Wilson*, for appellees.

HENLEY, J.—The appellees were the plaintiffs below, and began this action against appellant to recover for a burial outfit consisting of a casket, robe, slippers, and hose furnished by them to be used at the funeral and interment of appellant's wife. The total value of

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all the articles furnished, as specified in the bill of particulars filed with the complaint, was \$48.70. To the complaint filed against the husband for the recovery of this amount and interest for the unreasonable delay in paying the same, the appellant (the husband) has answered in three paragraphs. The first a general denial; the second seeks to avoid liability for the debt because, as averred in the answer, at the time of the death of appellant's wife, she was the owner of her own separate property and was living therein, separate and apart from appellant; that appellant had a good home and property both real and personal and was abundantly able to support and maintain his said wife, but that she abandoned him without cause, and at all times from the time she so left her husband until her death she had the privilege of returning to his said home and enjoying the luxuries therein provided; that the goods for which appellees seek to recover were purchased without appellant's knowledge or consent, and that at the time of the death of his said wife, she was solvent and owned property of the value of five hundred dollars; that appellees knew of the separation, and knew that appellant was not living with his wife when the goods were bought, and knew that a complaint for divorce had been filed against him by his said wife.

The third paragraph of answer sets up as a defense to this action an antenuptial contract, in which it was provided, that "It is therefore contracted and agreed by and between the said John Scott and Mary A. Chambers that the survivor of either shall take and hold no interest or part of interest by descent or otherwise in the estate of the deceased, but that the real and personal estate of each shall descend to the heirs the same as it would if they had not been married, except that if the said Mary A. shall survive the said

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John Scott she shall receive the sum of one thousand dollars of and from the estate of said John Scott; and further the consideration for said marriage, in the event of a separation between the said John and Mary A. shall occur, that a decree of divorce rendered in favor of either of said parties, the said Mary A. agrees with said John not to claim or insist on any alimony or judgment for alimony against him, or any money consideration whatever, or any of his property of any kind or nature."

The court overruled demurrers addressed to the second and third paragraphs of the answer. Judgment having been rendered in favor of the party presenting the demurrers to these answers, we are not called upon to pass upon their sufficiency as a defense to this claim.

Appellees filed a general denial, and upon the issues thus joined a trial was had by a jury and a special verdict returned by way of answers to interrogatories. Upon motion, judgment was rendered upon the facts so found in favor of the appellees for \$51.62. The motion of appellant for judgment upon the special verdict was overruled and excepted to. Appellant moved for a new trial, which was overruled, and thereupon he prayed an appeal to this court.

The assignment of errors filed herein properly presents for argument the rulings of the lower court to which the appellant excepted. The special findings of the jury upon which this judgment rests bring before the court the following material facts: That at the time of the sale of the goods by the appellees, the appellant was the owner of property of the value of ten or fifteen thousand dollars, and was not in debt; that Mary A. Scott, at the time of her death, was the lawful wife of appellant, but was living apart from him, and that she lived apart from him because she

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was badly treated by him; that she owned real and personal property of the value of \$365.00, and had no means of support except what was earned by her son, a boy of fifteen years; that the said Mary A. Scott, the wife of appellant, died on the 2nd day of August, 1894, less than one year after her marriage with appellant, and that the goods furnished by appellees were all used in burying her, and were charged to appellant at the time they were so purchased; that they were ordered by a neighbor of decedent; that they were such goods as would be used for a person in the situation and station in life occupied by decedent, and that the charges therefor were reasonable; that appellees knew, when they furnished the goods, that appellant and Mary A. Scott were not living together; that the said wife had commenced proceedings in court to obtain a divorce from appellant; that upon demand, appellant had refused to pay appellees' charges, and that there had been a long and unreasonable delay in the payment thereof. A great many other facts are found, which are not material. Upon the facts thus found, we think the lower court correctly rendered judgment in favor of the appellees. The goods furnished were certainly necessities. Schouler on Domestic Relations, section 199.

The facts found make a case very similar to the case of *Arnold v. Brandt*, 16 Ind. App. 169, where the court, speaking by Reinhard, J., said: "The husband owes the wife the duty of supporting and maintaining her, and she may enforce this duty in a proper case by pledging his credit to others who supply her with necessities. * * * While it is true that the obligation cannot be enforced if the wife has sufficient means of her own, we cannot subscribe to the doctrine invoked by the appellant that if she has any means, how-

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ever small, he cannot be rendered liable. In the present case, as we have said, there was evidence to the effect that her own means were inadequate ”

It is settled law of this State that a man who forces his wife and children to abandon his home by cruel and inhuman treatment is legally bound to one who supplies his wife with necessaries. The Supreme Court of this State, in the case of *Watkins v. DeArmond*, 89 Ind. 533, said: “A man owing a duty to supply his wife with necessaries, and who fails to perform it, cannot escape liability to one who does furnish her the necessaries on the ground that he gave notice that he would not be responsible for them. To permit this would be to put it in the power of bad husbands to deprive their wives of all means of living, for if notice terminated liability a man bad enough to beat his wife would be swift to give it.”

In the case of *Eiler v. Crull*, 99 Ind. 375, the Supreme Court said: “He [appellant] abandoned his wife, in said month, without her fault, taking with him all the household furniture and leaving her wholly destitute of money, food, or means of sustenance, and thereafter he furnished her nothing.

“She owned a tract of land of about one acre, with a small house thereon. About one month before said abandonment, she leased said premises, for a period of two years, to the plaintiff, her son by a former marriage, who, by the terms of the contract of letting, was to have the use of said premises for that period, in consideration of certain repairs which he agreed to make thereon, and which he did make.

“At the request of said wife, after she had been so abandoned, the plaintiff took her to said premises, where he resided, and thereafter he maintained her there at his expense, she having no property whatever

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except said premises. The plaintiff knew that she had no other property, and it was agreed between him and her that he would try to get some compensation for her maintenance from the defendant.

"The only question is whether the plaintiff could recover, notwithstanding the wife's ownership of said property, there being no express request or promise on the part of the defendant.

"During the period in which the plaintiff provided necessities for the abandoned wife, not upon her credit, no means of support accrued or could accrue to her from the real estate owned by her. For that period the defendant left her wholly without means of support; and having done so without her fault, he was liable to the plaintiff for providing for her necessities, without the defendant's express request or his express promise to pay therefor." See, also, *Litson v. Brown*, 26 Ind. 489.

In the case at bar the jury found that the only property owned by decedent was a cottage house of four rooms and personal property therein, all of the value of \$365; that at the time of her death she resided in this house and was wholly dependent upon her little son, who worked in a quarry, for support for herself and two other children. It was in this situation that appellant's wife died, driven from his house by his cruel treatment. Appellees furnished the goods to decently bury her and rightfully placed the charge for the same against appellant, her husband.

We do not believe the antenuptial contract in any way affects or changes the appellant's liability herein. The contract does not seek to exempt appellant from liability for necessities furnished the wife, but is simply directed to the disposition of their separate property after death.

We have passed upon all the alleged errors dis-

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cussed by appellant's counsel. Others, if any, must be deemed to have been waived.

We find no error in the record. The judgment is affirmed with 10 per cent. damages.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAIL-
WAY COMPANY v. MARTIN.

[No. 2,201. Filed June 2, 1897.]

CHANGE OF VENUE.—*Application For.—Duty of Court.*—Where, in a civil case, an application is made for a change of venue on the ground of local prejudice, in accordance with section 416, Burns' R. S. 1894, it is the imperative duty of the court to grant the change. *p. 681.*

SAME.—*Second Application.—Statute Construed.*—Under section 417, Burns' R. S. 1894, providing that only one change of venue shall be granted to the same party, a change of venue will not be denied because of a previous refusal to grant the change, for a reason no longer existing. *p. 682.*

SAME.—*Prejudicial Error.*—Error in overruling an application for a change of venue for local prejudice against the applicant is not rendered harmless by a subsequent waiver, by such applicant, of a trial by jury. *p. 682.*

From the Washington Circuit Court. *Reversed.*

E. C. Field, W. S. Kinnan and A. Elliott, for appellant.

J. A. Zaring and M. B. Hottel, for appellee.

BLACK, J.—The appellee brought this action to recover the value of services rendered by him as a physician and surgeon for an employe of the appellant.

On the 10th of December, 1895, the cause, being at issue, was set for trial on the 17th day of the same month. On the 14th day of said month appellant moved for a change of venue from the county. The court overruled the motion, "for the reason," stated

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in the ruling, as set forth in an entry copied in the transcript, "that this cause was heretofore set for trial in this court, in presence of local attorneys for both parties, and because of a published rule of court that it is too late after a cause is set for trial to apply for a change, and because the affidavit does not show that the defendant did not know, through other counsel or officers, before the cause was set for trial, that an odium exists to the prejudice of defendant."

On the 18th of December, 1895, the cause was called for trial, and the trial was entered upon before the court, without a jury. The court, having heard the evidence, took the cause under advisement until December 30, 1895.

On the 24th of December, 1895, the parties appeared, and the appellee moved to set aside the submission of the cause, and to sustain the demurrer to the complaint; and thereupon the court sustained the demurrer to the complaint and gave the appellee leave to amend.

On the 30th of December, 1895, the appellee filed an amended complaint, and the appellant, thereafter, on the same day, moved for a change of venue from the county, and filed an affidavit in support of the motion. The next day the court overruled the motion for a change of venue, and the appellant's exception to the ruling was duly saved by bill filed the same day.

On the 6th of January, 1896, the cause was continued generally. In the February term, 1896, a demurrer to the amended complaint was filed, and was overruled; and, an answer in denial having been filed, the cause was tried by the court without the intervention of a jury, in March, 1896.

We have to decide whether the court erred in overruling the appellant's second application for a change of venue.

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The statute, section 416, Burns' R. S. 1894 (412, Horner's R. S. 1896), provides: "The court in term, or the judge thereof in vacation, shall change the venue in any civil action upon the application of either party, made upon affidavit showing * * * that an odium attaches to the applicant, or to his cause of action or defense, on account of local prejudice."

The affidavit, filed upon the second application, purported to be made by the general attorney of the appellant, who had general charge and control of all its legal business, and had particular charge and control of the defense in this action; and he swore that he made the affidavit by appellant's authority, and at its instance and request, and on its behalf. For cause of change of venue, he swore that the appellant could not have a fair and impartial trial in this cause in the county, "for the reason that odium attaches to said defendant's cause of defense on account of local prejudice in said county."

This affidavit conformed to the requirements of the statute. The language of the statute is imperative. Where application for a change of venue is made in accordance with the statute, it is the duty of the court to grant it, and it is available error to refuse the change. *Rout v. Ninde*, 118 Ind. 123; *Bernhamer v. State*, 123 Ind. 577.

No question is made here by the appellant in relation to the refusal to grant the first application. The reason, based upon the rule of court, for overruling that application was not applicable to the second application. When the second application was made the cause was not set for trial. An amended complaint had been filed. The cause was not at issue when the second application was made. It was not then ascertained when it would be tried. It was put at issue and set for trial after the making of the second appli-

cation. The rule and the reason for the rule did not apply. It does not appear that any rule of court was relied upon for refusing the second application.

Reference is made by counsel for the appellee to the provision of section 417, Burns' R. S. 1894 (413, Horner's R. S. 1896), that "only one change of venue shall be granted to the same party from the county, and only one from the judge."

In the case before us, no change had been granted to either party, and the statute is not subject to the construction which the appellee seeks to put upon it. It is not contemplated thereby, that a proper application for a change shall not be granted because of the previous refusal, for a reason no longer existing, to grant a change, as in this case.

We cannot agree with counsel for the appellee that the error of the court in overruling the application for change of venue from the county was rendered harmless by the fact that the subsequent trial was, by the will and consent of the appellant, before the court, without the intervention of a jury.

The statutory right to a change from the county in any civil action applies to causes which must be tried by the court without a jury. It has been held that it extends even to a proceeding for divorce. *Evans v. Evans*, 105 Ind. 204.

Where, as here, in an action in which a party has a right to a trial by jury, his application for a change of venue from the county has been improperly overruled, and he afterward waives his right to a jury and consents to a trial by the court, the error, instead of being thereby rendered harmless, would seem to be made more manifest.

We are of the opinion that the second application for a change of venue should have been sustained.

The judgment is reversed.

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THE INDIANAPOLIS NATURAL GAS COMPANY ET AL. v.
SPAUGH ET AL.

[No. 2,115. Filed April 6, 1897. Rehearing denied June 2, 1897.]

LANDLORD AND TENANT.—*Gas Lease.—Indefiniteness of Description.—*

Complaint.—In an action to recover upon a covenant of a gas lease for the payment of a specified sum annually for failure to drill a well within the time specified, where the complaint describes the land as eighty acres of a certain tract, “reserving sixty acres around the buildings on said premises,” the boundaries to be designated by the “party of the first part,” the indefiniteness of the description does not defeat the action where it is further alleged that the lessor was ready at all times to locate the boundaries. *pp.* 684–687.

PLEADING.—*Joint Cause of Action.—Complaint.*—A complaint which fails to state a joint cause of action in favor of all plaintiffs who join therein, is bad on demurrer for sufficient facts. *pp.* 687, 688.

SAME.—*Complaint.—Theory.*—A complaint must proceed upon a definite theory, and upon that theory it must state facts sufficient to constitute a cause of action in favor of all parties who join as plaintiffs. *p.* 688.

SAME.—*Action on Lease.—Complaint.*—Where two parties join as plaintiffs in an action against the lessor to recover upon the covenant of a lease which, by its terms, runs only to one of the parties, a complaint which fails to aver what interest the other had in the subject-matter of the suit, except her signature to the lease, is demurrable for failure to state a joint cause of action in favor of both plaintiffs. *pp.* 688, 689.

From the Tipton Circuit Court. *Reversed.*

F. E. Gavin, C. F. Coffin, T. P. Davis, T. J. Kane
and *R. K. Kane*, for appellants.

George Shirts, I. A. Kilbourne and *A. F. Kilbourne*,
for appellees.

ROBINSON, J.—The question involved in this appeal is the sufficiency of appellees’ complaint.

The complaint alleges that on the 3d day of May,

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1887, appellees "rented and leased their farm containing 80 acres, more or less, situated in Hamilton county, Indiana, bounded on the north by the lands of Ellis Roberts, on the east by the lands of A. Harvey, on the south by the lands of A. Harvey, on the west by the lands of F. Inman, to the firm of J. M. Guffy & Co.;" by the terms of the lease which was for five years, it was provided, among other things, that if gas was obtained in sufficient quantities to utilize, the consideration should be \$100.00 for each well drilled on the land, payable within sixty days after the completion of the well, and thereafter yearly in advance; that operations should begin within three months, and one well completed within six months from the date of the lease or agreement; and on failure to complete one well within such time, plaintiffs were to receive for such delay the sum of \$100.00 per annum, thereafter, until such well should be completed; that, though often requested, defendants had never commenced or completed any well on said premises, but had failed and refused to comply with the contract. The complaint shows proper assignments of the lease from the lessee to the appellant, the Indianapolis Natural Gas Company; that no part of the sums of money agreed to be paid had ever been paid; that plaintiffs were, at all times, ready and willing and offered to locate all boundary lines and wells, but defendant would not consent, and refused to allow the same to be done, and judgment is asked for one thousand dollars.

A demurrer for want of facts was overruled and judgment rendered in appellees' favor for one thousand dollars.

The complaint is assailed on the ground that the real estate mentioned is insufficiently described, that it is not shown that appellees complied with the terms

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of the lease before bringing suit, and that no cause of action is stated in favor of Parnitha E. Spaugh, who is joined as a party plaintiff.

The lease is filed with and made a part of the complaint. The description of the real estate in the lease is "all that tract of land situated in Washington township, Hamilton county, and State of Indiana, bounded and described as follows, to-wit: On the north by land of Ellis Roberts, on the east by lands of A. Harvey, on the south by lands of A. Harvey, on the west by lands of F. Inman, containing 80 acres, more or less, excepting and reserving therefrom sixty (60) acres around the buildings on said premises, upon which there shall be no wells drilled by either parties, the boundaries of which shall be designated and fixed by the party of the first part."

It is evident the parties intended the lease to include twenty acres of land.

In *Whittelsey v. Beall*, 5 Blackf. 143, suit was brought to foreclose a mortgage upon real estate described as "that certain tract or parcel of land containing 300 acres, lying and being in the county of Knox and State of Indiana, about four miles northeast of Vincennes, and adjoining lands of David M'Cord and others, being the same tract of land that was conveyed to said Isaac N. Whittelsey by Benjamin Tomlinson and John Ross, on the 25th day of May, 1837." The objection was urged that the description of the land was too indefinite to authorize a decree ordering its sale. The court said: "We think the objection well taken. We do not mean to say that the description is so vague as to make the deed inoperative. It may be sufficient to convey the land. That point, however, is not before us. But we think the bill is defective in not so describing the land, that the officer of the court may

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know on what premises to enter to execute the order of the court.”

In *Swatts v. Bowen*, 141 Ind. 322, a mortgage was sought to be foreclosed upon the following land: “All that certain tract or parcel of land adjoining the lands of John Summerville on the east, Peter Speece on the south, and Hiram Allen on the north, being a portion of the north end of the upper half of the lower half of the upper section of Conner’s reservation, said to contain one hundred and fourteen acres, more or less.” The court held that this description, if embodied in the decree, would not be sufficient to enable the sheriff, by the aid of a surveyor, to locate the land mortgaged. Were the case at bar a suit asking a decree of the court to enforce a lien against the real estate described, the description, upon the authority of the above cases, might be insufficient.

The description contained in the lease must control, and there are no averments in the complaint that in any way aid the description. But conceding for the purpose of the argument that the description is bad, the lease contains enough within itself to make the description sufficiently certain for the purposes of the lease. If all the terms of the contract had been complied with, it could not have failed of execution by reason of the imperfect description, because the lessor agreed to locate the boundaries of the land attempted to be described.

It is argued that the agreement to locate the boundaries is a condition precedent which the complaint fails to show was performed before suit was brought. It is true, the lessor could have located the boundaries at any time, but it was unnecessary to do so until the lessee was ready to begin operations under the lease. The lessor was not only to locate the boundaries of the land, but was also to locate the wells. After the

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lease was executed, if the lessee should conclude not to sink any wells the location of the exact boundaries would be unnecessary. But even if it were conceded that this requirement is strictly a condition precedent, a point we do not decide, still the complaint avers that the lessor was ready and willing at all times to locate the boundaries, but that appellants prevented it, and refused to permit the same to be done. No one could complain that the boundaries were not located except appellants, and if they prevented such location, they cannot now say that appellee is in default. The complaint shows a sufficient excuse for not complying with that provision of the lease.

It is argued that the complaint fails to state a joint cause of action in the appellees, John E. Spaugh and Parnitha E. Spaugh. Appellees both signed the lease, although it was an agreement made with John E. Spaugh, alone. The lease reads: "This lease, made this 3d day of May, 1887, by and between John E. Spaugh, of the county of Hamilton, and State of Indiana, of the first part, and J. M. Guffy & Co., of Pittsburgh, Pennsylvania, of the second part, witnesseth," etc.

This is a suit on a contract, and counts on one of the covenants contained in the lease. The lease was properly filed with and made a part of the complaint. The particular covenant in the lease upon which recovery is sought is that where it is agreed that the lessee will complete one well within six months from the date of the lease, and on failure to complete a well within that time the lessee agrees to pay to "the party of the first part," John E. Spaugh, for such delay one hundred dollars per annum within three months after the time for completing such well.

The rule is well settled that where several plaintiffs join and the complaint fails to state a joint cause of

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action in favor of all it is bad on demurrer for want of sufficient facts. *Swales v. Grubbs*, 6 Ind. App. 477; *Brumfield v. Drook*, 101 Ind. 190; *Nave v. Hadley*, 74 Ind. 155.

In the case of *Holzman v. Hibben*, 100 Ind. 338, the complaint averred that one member of the late firm of plaintiffs, since the commencement of the suit, had died, and by leave of the court the complaint had been amended by the substitution of his widow's name in the place of that of the deceased, averring that deceased had willed all his interest in the partnership accounts to such widow, and that all the partnership debts were paid. There was no allegation in the complaint that there was no administration with the will annexed, or no executor upon the estate of the deceased partner, or that there were no debts against his estate so as to authorize the widow to sue, and it was held there was no cause of action shown in the widow.

A complaint must proceed upon some definite theory, and upon that theory it must state facts sufficient to constitute a cause of action in favor of all parties who join as plaintiffs. *Brown v. Critchell*, 110 Ind. 31; *Chicago, etc., R. R. Co. v. Bills*, 104 Ind. 13; *Peters v. Guthrie*, 119 Ind. 44;

The appellees join as plaintiffs, and the complaint proceeds upon the theory that they have a joint interest in the cause of action, but there is no averment showing what interest Parnitha E. Spaugh has in the subject-matter of the suit, and nothing showing her connection with the subject-matter of the suit, except her signature to the lease, and that she and her co-plaintiff leased to appellant's assignor their farm. There is nothing in the pleading to indicate what relationship, if any, the appellees have to each other. While she signed the agreement yet it does not appear that by its terms she was to do or to receive anything.

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She is an entire stranger to the lease or agreement, except her signature at the close. The complaint shows that she has an interest in the real estate mentioned in the lease, but it does not show what that interest is. From the allegations in the complaint this court would presume that appellees own the real estate as tenants in common. But it does not, then, necessarily follow that she has a joint interest in the cause of action. The judgment sought and rendered is in favor of both appellees and to entitle them to such a judgment a joint cause of action must be shown in favor of both. This the complaint fails to do. The demurrer should have been sustained.

Judgment reversed.

BOARD OF COMMISSIONERS OF MONROE COUNTY
v. GALLOWAY.

[No. 2,220. Filed June 2, 1897.]

TOWNSHIP TRUSTEE.—*When May Bind County for Medical Aid to Poor.*—A township trustee as overseer of the poor has power to bind the county for medical aid for a poor person of his township, where the physician employed by the county has abandoned his contract. *p. 693.*

SAME.—*Employment of Physician for Poor.*—A township trustee as overseer of the poor has no authority to bind the county by his contract in the employment of a physician to attend the poor where the county has already made provisions therefor. *p. 695.*

SAME.—*Employment of Physician for Poor.*—*Agent for the County.*—A township trustee in the employment of a physician for the poor is the agent of the county, and can only bind the county while he acts within the scope of his authority as prescribed by statute. *p. 698.*

From the Monroe Circuit Court. *Reversed.*

R. A. Fulk and Edwin Corr, for appellant.

J. R. East and R. G. Miller, for appellee.

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WILEY, C. J.—Appellee was a licensed practising physician and surgeon, and sued appellant for services rendered a poor person, the services being rendered under the employment of the township trustee. The complaint avers that on the 13th day of December, 1894, appellee was employed by one Wylie Robinson, trustee of Washington township, in Monroe county, to attend professionally one Nancy Goble, who was then a poor person, residing in said township, and who was wholly unable to care for herself; that said Goble was seriously ill, and that she required the immediate attendance and care of a physician; that at the time of said employment said trustee did not know that the board of commissioners had employed a physician to attend and wait upon the poor of said township; that appellee continued to wait upon and visit said Goble until March 3, 1895, and during all of said time he had no knowledge that the board of commissioners had employed a physician to attend the poor of said township; that his services were reasonably worth \$54.00, and that he filed a claim for said amount before the board of commissioners, which they refused to pay, and wholly disallowed. The complaint further avers that prior to December 1, 1894, the said board of commissioners contracted “privately” with one Dr. Canada, a licensed physician of said county, to attend upon the poor of said township, but that said employment did not come to the knowledge of the appellee or said trustee until March 3, 1895; that in making said contract with said Canada there was no notice given thereof, and no record made of the same, and no contract recorded; and that said Canada did not notify said trustee of said employment, and that he did not wait upon the poor of said township; that during the time appellee was performing the services named, the said Canada lived within three miles of said Goble,

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and that during all of said time did not in any manner notify said trustee or appellee, and that said trustee could not, by the use of reasonable care, have known of such employment, and that during the time appellee was waiting upon said Goble, said Canada wholly abandoned his said contract.

Appellant demurred to the complaint for want of sufficient facts, which demurrer was overruled. The cause was tried by the court upon the general issue, and at the request of the appellant the court made a special finding of facts, and stated its conclusion of law thereon.

The essential and controlling facts, as found by the court, are as follows: That appellee was a licensed and practising physician and surgeon; that from December 14, 1894, until March 3, 1895, James W. Robinson was trustee of Washington township, Monroe county, and that he was overseer of the poor of said township; that on June 16, 1894, the board of commissioners of said county contracted with James L. Canada, a licensed and skillful physician and surgeon, to attend and wait upon the poor of said township for one year, and that said Canada was, during all of said time, ready and willing to render medical attention to the poor of said township; that one Nancy Goble, a poor person residing in said township, was a charge thereon from December 13, 1894, to March 3, 1895; that on December 13, 1894, said Goble was dangerously ill and needed immediate medical attention; that said Robinson, being informed of said illness, employed appellee to furnish her medical attention as a poor person; that in pursuance to said employment appellee waited upon her professionally from December 13, 1894, to March 3, 1895, and that his services were reasonably worth \$54.00, and that no part thereof has been paid; that prior to the commencement of this action appel-

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lee filed his claim for his services before the board of commissioners, but that said claim was rejected and disallowed; that at the time said trustee employed appellee, as aforesaid, he had no knowledge of the employment of said Canada, as aforesaid, and did not learn said fact until March 3, 1895; that appellee did not know of the employment of said Canada and did not learn thereof until March 3, 1895; that appellee lived about seven miles from said Goble, and that before the appellee was employed the husband of said Goble called upon and requested said trustee to furnish a physician to wait upon his said wife; that one Dr. Presley, who had been attending her, had abandoned the case; and thereupon said trustee gave said husband a written request and employment to be delivered to the appellee, and that the same was delivered to him; that at said time said trustee resided about eight miles from said Goble, and that said Canada resided about two miles from said trustee, and two and a half miles from the residence of said Goble. It is further found that at the June term, 1894, of said board of commissioners, the said Canada filed a bid to attend to all pauper practice in said township for one year for \$45.00, and that said board then and there made an order accepting said bid, and directed said Canada to enter into a contract to perform the services under said bid; that June 16, 1894, said Canada entered into a written contract to perform the services, with said board, but this written contract was never recorded in the order book of said court, but was filed among the "contracts and files of the auditor's office;" and that no notice was given said Robinson nor the appellee until March 3, 1895. The court also found that at the time appellee was employed, the services of said Canada could have been as readily

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procured, and that he resided nearer said Goble than appellee.

Upon the facts thus found, the court stated its conclusion of law, that appellee was entitled to a judgment against appellant for \$54.00, and to the conclusion of law as stated by the court, appellant at the time excepted, and judgment was rendered against it for the amount.

Appellant has assigned errors as follows: First, the court erred in overruling its demurrer to the complaint, and, second, the court erred in its conclusion of law.

The first specification of error is not well taken. The complaint, among other things, averred that Dr. Canada, who had been employed by the board of commissioners to wait upon the poor of Washington township, had abandoned his contract with the appellant. Treating much of the complaint as surplusage, the allegation to which we have just referred, in our judgment, makes the complaint good.

A township trustee is, by law, made the overseer of the poor of his township, and if Dr. Canada had abandoned his contract with the appellant (and the demurrer admits that he had), then there was no physician in said township whose duty it was to wait upon the poor, and in that event it was the duty of the trustee to furnish medical aid to the poor of his township in all instances within the provisions of the law.

But, from the view we take of the law, which must control, it is unnecessary to extend this opinion as to the sufficiency of the complaint.

The law, applied to the facts as found by the court, in our judgment, relieved the appellant from liability.

By section 8069, Burns' R. S. 1894 (5994, Horner's R. S. 1896), the township trustee is made the overseer of the poor of his township, but by its terms no ex-

press authority is conferred upon him to employ medical aid for such poor persons.

Section 8142, Burns' R. S. 1894 (6066, Horner's R. S. 1896), is as follows: "Township trustees of the several civil townships of this state shall be the 'overseers of the poor' within their respective townships, and shall perform all the duties with reference to the poor of their respective townships that may be prescribed by law."

Section 8147, Burns' R. S. 1894 (6071, Horner's R. S. 1896), is as follows: "The overseer of the poor in each township shall have the oversight and care of all poor persons in his township so long as they remain a county charge, and shall see that they are properly relieved and taken care of in the manner required by law."

Section 7851, Burns' R. S. 1894 (5764, Horner's R. S. 1896), is as follows: "It is hereby specially made the duty of such board [commissioners] to contract with one or more skillful physicians, having knowledge of surgery, to attend upon all prisoners confined in jail, or paupers in the county asylum, and may also contract with physicians to attend upon the poor generally in the county; and no claim of a physician or surgeon, for such services, shall be allowed by such board except in pursuance of the terms of such contract: provided, that this section shall not be so construed as to prevent the overseers of the poor, or any one of them, in townships not otherwise provided for, from employing such medical or surgical services as paupers within his or their jurisdiction may require."

We must look to and construe all these provisions together to ascertain their full import and the power conferred by them upon public officers to bind the county thereunder.

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It seems to us that a township trustee, by virtue of these statutes, has no authority as overseer of the poor to bind the county by his contracts in the employment of a physician to attend the poor where the county has already made provision therefor. This is the established rule as settled by the uniform decisions in this State.

In *Board, etc., v. Boynton*, 30 Ind. 359, it was held that, under these provisions of the law, the trustee has no power to employ physicians, except in the event that the commissioners fail to do so.

This rule was quoted approvingly in *Board, etc., v. Hon*, 87 Ind. 356, and in that case the Supreme Court, speaking by Woods, C. J., said: "Outside of these provisions there can be no liability of the county for the services of physicians or surgeons." If the county board failed to employ a physician for the poor of the township, the power of the trustee arises and it is his duty to act when a necessity occurs. Under such circumstances his decision in respect to a matter within his discretion, and within the statutes is conclusive. But he cannot, by assuming power, acquire it.

It has been held, that where provision had been made by the county board for medical and surgical aid for the poor of the township, and the physician thus contracted with refused to act, and another physician rendered services without employment from the trustee, the county was not liable, though there was an emergency for such action. *Morgan County v. Seaton*, 122 Ind. 521.

In the last case cited the Supreme Court, speaking by Mitchell, C. J., said: "While it is true that it is made the duty of every county in the State to relieve and support the poor and indigent, the method by which support and relief are to be administered is dis-

tinctly pointed out by law. * * * The law imposes the duty of determining who are poor persons, entitled to relief, primarily upon the township trustee, acting as overseer of the poor. * * * The benefactions of the State are to be dispensed in pursuance of a carefully devised plan, which is to be executed by officers designated by the law."

Referring to section 7851, *supra*, the court, in the same case, says: "As will be seen, this section in terms prohibits the board of commissioners from allowing any claim of a physician for services, except in performance of a contract of employment, therein authorized to be made, and it has been uniformly held that the overseer of the poor has power to employ a physician only in the event the board of commissioners fail to make suitable provision for attendance upon the poor by contract."

The case of *Woodruff v. Board, etc.*, 10 Ind. App. 179, is very similar to the case now under consideration. In that case the appellant was employed by a township trustee to wait upon a poor person. He performed the services required by the employment and sued the county therefor. The appellee answered, setting up a contract between it and certain skillful and competent physicians and surgeons to wait upon the poor of that township, and that such physicians were accessible, and ready and able to perform all necessary medical and surgical services for the poor of such township. This court, speaking by Lotz, C. J., said: "It fully appears, from the averments of the answer, that ample provision had been made for the poor of Perry township. This being true, the trustee had no power to make a contract with the appellant binding upon the county."

It is true, that where a physician has been regularly employed by the board of commissioners to wait

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upon the poor, but he is not accessible, and an emergency arises, or in case he should refuse to act or abandon his contract, the trustee of the township may employ a physician, in case of urgent necessity, to treat a poor person in need of medical or surgical aid, and in the absence of fraud the county will be bound by his judgment and contracts, and held liable for such services. *Board, etc., v. Seaton*, 90 Ind. 158; *Washburn v. Board, etc.*, 104 Ind. 321.

The power vested by statute in the board of commissioners to employ medical and surgical aid for the poor of a township or the county, and where there has been an exercise of that power, and suitable provision has been made, it divests the township trustee of power to act, and he has no authority to employ medical aid for the poor of his township, unless the physician employed by the county abandons his contract, or refuses to perform it, or is at such a distance that his attendance cannot be readily procured, or an emergency exists, or he lacks the skill and experience necessary to render reasonably efficient services in the case, and the dictates of humanity seem to require immediate action upon the part of the trustee. *Board, etc., v. Osburn*, 4 Ind. App. 590.

In line with the authorities in Indiana is the case of *Goodrich v. City of Waterville*, 88 Me. 39. Under a statute in that state, cities and towns are authorized to elect a physician to wait upon the poor, and in construing that law the Supreme Court said: "When a town or a city has already provided for the medical treatment of its sick paupers, by the election of a town or city physician, and he is ready and willing and competent to attend a sick pauper, so that no necessity exists for employing any other, it is undoubtedly the duty of the overseers of the poor to call him, when one of the paupers under their care is sick and in need

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of medical treatment.” It is also held in that case that where another physician is called he is chargeable with notice that he will have no right to call upon the town or city to compensate him for his services.

A township trustee in the employment of a physician for the poor of his township is the agent of the county, and can only bind the county while he acts within the scope of his authority. That authority is fixed by law and his duties are circumscribed by statute. His agency, therefore, is of such a character that all are bound to take notice of its scope and limitations.

Where a trustee does not act within the scope of his statutory power, and where he has no authority to act at all, he can neither bind his township nor the county. In dealing with a township trustee, all persons are bound to take notice of his official and fiduciary character, and are also bound to know that he can only bind his township or the county for which he acts, while such acts are authorized by law. See *First Nat. Bank v. Adams School Tp.*, ante, 375, and cases there cited.

In *Board, etc., v. Fertich*, 18 Ind. App. 1, this court, speaking by Black, J., said: “Counties are involuntary political or civil divisions of the State, created by general laws, to aid in the administration of the State government. The powers of the board of county commissioners are limited, being created and defined by statute. For an act done by such board not within the scope of its statutory powers, the county is not liable.

* * * The board cannot do any act which is not either expressly or impliedly authorized by statute. * * *

Where the mode of exercising a power by the board is prescribed by statute, that mode must be pursued. *

* * All persons who deal with the board must recognize the limits of its powers, and are bound to take

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notice that it cannot bind the county by any action not within its statutory authority." These principles are alike applicable to a township trustee, and further citation of authority is unnecessary to support them.

Other questions are raised by the record and discussed by counsel, but from the authorities cited, and what we have said, make it unnecessary to decide them. From the averments of the complaint and the facts found by the court, there was no apparent necessity or urgent emergency for the appellee's employment to wait upon Mrs. Goble, while Dr. Canada, the regularly employed physician under a contract with the board of commissioners, was accessible, competent and ready and willing to act.

The appellee, as shown by the authorities cited, being chargeable with notice, that under these facts and circumstances he would have no right to call upon the county to compensate him for his services, has no right of action against the county.

It follows, therefore, from what we have said that the court erred in its conclusion of law, and the judgment is reversed, with instructions to the court below to restate its conclusion of law and render judgment for appellant.

WHITE ET AL. v. SHEETZ.

[No. 1,671. Filed Dec. 30, 1896. Rehearing denied March 16, 1897.]

From the Benton Circuit Court. *Affirmed.*

Daniel Frazer and William Isham, for appellants.

George Wadsworth, Dawson Smith and G. H. Gray, for appellee.

REINHARD, J.—Appellants' counsel ask us to reverse this case on the evidence. In their original brief they entirely fail to point out wherein the evidence is insufficient. This omission they seek to supply in their reply brief; but counsel should have stated their reasons

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more explicitly in their opening brief. We have, however, examined the evidence and find it sufficient to sustain the verdict. The appellee leased to the appellants certain real estate for the term of one year. After the term expired the appellants held over and paid rent to appellee, which was received by her. There is a conflict in the evidence as to whether this holding over was under the original tenancy, or whether a new contract was entered into between the parties for another specified term. The jury found the holding over was under a new agreement. There is evidence to support this finding. Judgment affirmed.

THE ATLAS NATIONAL BANK v. CULBERTSON ET AL.

[No. 2,117. Filed March 16, 1897.]

From the Floyd Circuit Court. *Appeal dismissed.*

S. D. Miller, Hord & Perkins, E. G. Henry and Stebbins & Evans, for appellant.

Henry Dowling and Alexander Dowling, for appellees.

HENLEY, J.—This case is, in all essential respects, identical with the case of the *Harrison National Bank v. Culbertson*, decided by the Supreme Court of this State December 23, 1896 (45 N. E. 657).

For the reasons therein stated, this appeal is, upon appellee's motion therefor, dismissed.

QUEEN ET AL. v. LIPINSKEY ET AL.

[No. 1,934. Filed Dec. 15, 1896. Rehearing denied April 1, 1897.]

From the Huntington Circuit Court. *Appeal dismissed.*

George D. Parks, J. F. France and Z. T. Dungan, for appellants.

M. L. Spencer, W. A. Branyan and B. M. Cobb, for appellees.

DAVIS, J.—On the 10th day of May, 1895, in the Huntington Circuit Court, Simon H. Lipinskey and Martin Mindnich recovered judgment in attachment proceedings against Jacob L., D. Queen and William L. White, First National Bank of Huntington, Charles W. Watkins and Alvin McEndaffer. On October 28, 1895, said Queen, White

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and Watkins filed a transcript on appeal from said judgment in the office of the clerk of the Appellate Court.

Neither the First National Bank nor the said Alvin McEndaffer was in any manner made a party to said appeal. On August 20, 1896, appellee Mindnich filed a motion in this court to dismiss the appeal for the reason that the First National Bank and Alvin McEndaffer were not parties to the appeal.

On the 3d of September, 1896, after the expiration of the year allowed for the appeal, the appellants filed an application asking leave to amend their assignment of errors, making said bank and McEndaffer parties to the appeal, and also, at the same time, filed the refusal of the bank and McEndaffer to join in the appeal.

The question presented for our consideration is identical with the question presented in *Holloran v. The Midland R. W. Co.*, 129 Ind. 274, and on the authority of that decision the motion to dismiss is well taken.

Appeal dismissed.

BANNISTER ET AL. v. ADAMS SCHOOL TOWNSHIP, ET AL.

[No. 2,146. Filed April 9, 1897.]

From the Madison Superior Court. *Affirmed.*

C. L. Henry, E. B. McMahan and J. A. VanOsdol, for appellants.

F. A. Walker and F. P. Foster, for appellees.

WILEY, J.—The questions involved in this case are in all essential respects, identical with those in the case of *The First National Bank, etc., v. Adams School Township et al.*, ante. 875, decided by the court at the present term, and upon the authority of that case the judgment is affirmed.

INDIANAPOLIS GAS COMPANY ET AL. v. RAYL ET AL.

[No. 2,116. Filed April 9, 1897. Rehearing denied June 2, 1897.]

From the Tipton Circuit Court. *Reversed.*

T. J. Kane, R. K. Kane and Gavin, Coffin & Davis, for appellants.

A. F. Shirts, George Shirts and I. A. Kilbourne, for appellees.

Indianapolis Gas Company *et al.* v. Rayl *et al.*

ROBINSON, J.—This appeal involves the sufficiency of appellees' complaint.

The complaint alleges that on the 4th day of May, 1887, the appellees "rented and leased their farm containing forty acres, more or less, situate in Hamilton county, Indiana, bounded on the north by the lands of M. Jessup, on the east by the lands of J. Stanley, on the south by the lands of A. Bond, on the west by the lands of John Ortwein and others, to the firm of J. M. Guffy & Co.;" that the lease provided that if gas was found in sufficient quantities to utilize, the consideration should be one hundred dollars for each well drilled, payable within a certain time and thereafter yearly, in advance; that one well should be completed within six months after the date of the lease, and in case of a failure to complete one well within such time, the lessee agreed to pay to the plaintiffs for such delay the sum of one hundred dollars per annum thereafter, until such well should be completed; that by proper assignments the lease was transferred to appellants, who had failed and refused to comply with the terms of the lease; that plaintiffs were at all times ready and willing and offered to locate all boundary lines and wells, but appellants would not consent and refused to allow the same to be done. The complaint asks damages for one thousand dollars. The lease is filed with and made a part of the complaint.

A demurrer for want of facts was overruled and judgment rendered in appellees' favor for one thousand dollars.

Objection is made to the complaint that the real estate mentioned is insufficiently described; that it is not shown that appellees complied with the terms of the lease before suit was brought, and that no cause of action is stated in favor of Margaret Rayl, who joined as a party plaintiff.

The description of the real estate, as set out in the lease, is: "All that certain tract of land, situated in Washington township, Hamilton county, State of Indiana, bounded and described, as follows, to-wit: On the north by the lands of M. Jessup, on the east by the lands of J. Stanley, on the south by the lands of A. Bond, and on the west by the lands of John Ortwein and others, containing forty acres, more or less, excepting and reserving therefrom thirty-nine acres around the buildings on said premises upon which there shall be no wells drilled by either parties; the boundaries of which shall be designated and fixed by the party of the first part."

It is contended that the complaint fails to state a joint cause of action in the appellee A. P. Rayl and Margaret Rayl. The appellees both sign the lease although it was an agreement made with A. P. Rayl alone. The lease reads: "This lease made this 4th day of May, 1887, by and between A. P. Rayl, of the county of Hamilton, and State of Indiana, of the first part, and J. M. Guffy & Co., of Pittsburg, Pennsylvania, of the second part, witnesseth, etc."

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The particular covenant in the lease upon which a recovery is sought provides that the lessee, under certain conditions, agrees to pay to "the party of the first part," A. P. Rayl, a certain sum of money.

The questions involved in this appeal and discussed in the briefs of counsel are identical with those involved in the *Indianapolis Natural Gas Co. v. Spaugh*, ante, 683.

Upon the authority of that case, the judgment is reversed with instructions to sustain the demurrer to the complaint.

SHIRK v. SIMPSON ET AL.

[No. 2,188. Filed June 11, 1897.]

From the Howard Circuit Court. *Affirmed.*

John Mitchell, Nott N. Antrim, W. B. McClintic and Bell & Purdum,
for appellant.

J. C. Blacklidge and C. C. Shirley, for appellees.

BLACK, J.—For the determination of the questions presented in argument by the appellant, it would be necessary for us to look to the reporter's original longhand manuscript of the evidence and the objections and exceptions at the trial; but, as suggested by counsel for the appellees, the original longhand manuscript cannot be regarded as properly before us, for the reason that it does not appear that it was filed in the clerk's office before it was incorporated in the bill of exceptions in which it appears in the transcript brought to this court.

The decisions to this effect are quite numerous. See *De Hart v. Board, etc.*, 143 Ind. 363; *Smith v. State*, 145 Ind. 176; *Pittsburg, etc., R. W. Co. v. Cope*, 16 Ind. App. 579.

The judgment is affirmed.

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ABATEMENT—Matter in abatement showing that an action was prematurely brought cannot be pleaded with an answer in bar, see PLEADING, 2; *Voluntary Relief Department, etc., v. Spencer, 123*. A plea in abatement must precede an answer in bar, see PLEADING 1; *Sanders, Admx., v. Hartge, 243*.

ACCIDENT INSURANCE—

1. *Death While Engaged in an Unlawful Act.—Answer.*—In an action on an accident insurance policy exempting the company from liability for death of insured while engaged in any unlawful act, an answer attempting to set up as a defense a violation, by the insured, of a statute forbidding seining in streams where the water is above tidewater, which answer fails to allege that the seining was at a point in the stream where the water was above tidewater, is insufficient on demurrer. *Conboy v. Railway Officials, etc., Assn., 62*.
2. *Death During Violation of Law.*—That death ensues during the violation of a statute does not absolve an accident insurance company from liability under a provision of the policy exempting the company from liability if death results from an unlawful act, unless it appears that the act was one which increased the risk, and one between which and the death there was a causative connection. *Ib.*
3. *Voluntary Exposure to Danger.—Answer.*—In an action on an accident insurance policy exempting the company from liability for death of insured, resulting from a “voluntary exposure to unnecessary danger or perilous venture,” an answer alleging that deceased at the time of his death was seining in the swift current of a river in which there were sudden step-offs or holes, and that he could not swim, and that he stepped into one of such holes and was caught up by a swirl or eddy and was drowned, but which answer fails to allege that the deceased knew of the dangers and voluntarily exposed himself thereto, is not sufficient on demurrer. *Ib.*
4. *Railroad Relief Association.—Complaint.*—A complaint in an action against a railroad relief association alleging that on a specified day plaintiff met with an accident wholly without any cause or negligence on his part, and that he had fully complied with all the terms of his contract, negatives the idea that he violated any condition precedent to recovery under the rules of the association. *Voluntary Relief Department, etc., v. Spencer, 123*.
5. *Railroad Relief Association.—Answer.*—An answer, in an action against a railroad relief association, setting up that the accident for which plaintiff sued did not occur to plaintiff while in the performance of the duties of his employment as required by the rules of the association, but resulted from plaintiff voluntarily and unnecessarily exposing himself to danger, when off duty, and while seeking his own pleasure, is demurrable as stating conclusions instead of facts. *Ib.*

6. *Rules of Railroad Relief Association, When Void.*—A rule of a railroad relief association which makes any decision of the advisory committee, with regard to an accident to a member, final and conclusive upon all parties, without exception or appeal, is void as an attempt to cut off the right to resort to the courts. *Ib.*
7. *Valid Rules of Relief Association.*—The requirement that the holder of a certificate of membership in a railroad relief association, in the event of a controversy between such holder and the association in reference to an indemnity claim, shall submit the same to the superintendent for determination, is a condition precedent which the holder must show he performed before bringing suit, or show a valid reason for its nonperformance. *Ib.*

ACTION—

1. *Nature Of, How Determined.*—The question whether an action in which a judgment was recovered was an action in tort or in contract, must be determined by the pleadings in the cause in which the judgment was rendered. *Green v. Simon, 360.*
2. *Action on Guardian's Bond an Action in Contract.—Exemption.*—An action on a guardian's bond, under section 2691, Burns' R. S. 1894, is an action in contract, within section 715, Burns' R. S. 1894, allowing a householder's exemption on execution or other final process for any debt growing out of, or founded upon a contract. *Ib.*
3. *Dismissal Of.—Payment of Costs Before Bringing Another Action for Same Cause.—Discretion of Court.*—Where a cause has been voluntarily dismissed by the plaintiff, and the costs have been awarded against him, and he has brought another action for the same cause, an application of the defendant for a stay of proceedings until the costs so awarded have been paid, or for the dismissal of the second action because of nonpayment of such costs within a limited time, is addressed to the sound discretion of the court. *Eigenman v. Eastin, Admx., 580.*
4. *Dismissal of Action.—When Payment of Costs of Former Action Should be Required Before Proceeding With Second Action.*—An application to prevent a party who has voluntarily dismissed his cause of action from proceeding with a second action based upon the same cause unless he pay the costs assessed against him in the former one should not be sustained unless it appears to the court in the exercise of a sound discretion under the facts and circumstances of the particular case, that the second action is without merit, and is vexatious. *Ib.*

AFFIDAVITS—When bad for duplicity, see CRIMINAL LAW, 2, 3, 4; *Herron v. State, 161.*

Sufficiency of to charge defendant with unlawfully acting as agent of a foreign insurance company doing business without authority, see CRIMINAL LAW, 6; *State v. Campbell, 442.*

Sufficiency in support of a motion for a new trial when party claims to have been misled by court as to time of trial, see NEW TRIAL, 2; *Prudential Ins. Co. v. DeBord, 224.*

Counter-affidavits may be filed questioning the credibility of newly discovered evidence alleged in affidavits supporting motion for new trial, see NEW TRIAL, 4; *Hammond, etc., R. W. Co. v. Spyzchalski, 7.*

Sufficiency of in an Action Against a Saloonkeeper for Allowing a Minor to Loiter in a Saloon.—An affidavit against a saloonkeeper under section 5 of the act of 1895 (Acts 1895, p. 248), for allowing a minor to loiter in a saloon is not bad by reason of its failure to charge that the offense was "unlawfully" committed.

Walbert v. State, 350.

AGENCY—See PRINCIPAL AND AGENT.

Liability of Agent for Act of Sub-Agent.—Fraud.—Statute of Limitations.—B, a general loan agent, had an agreement with a local loan agency by which such local agency was to receive applications for loans and forward same to B, and in the event that a loan was thus made the commission paid was to be shared by both. Through the local agency, A made application for a loan which in pursuance of the agreement was procured by B, the general agent, and a draft for the money, payable to A, was forwarded to the local agents with instructions to see that all liens and incumbrances were paid that were on the land offered for security, and to complete the loan. The local agents notified A that it was necessary for him to endorse the draft to them that they might pay off a certain school fund mortgage, and the endorsement was made. One of the local agents who was also county auditor, fraudulently delivered up the school fund note and mortgage, fully receipted and satisfied, but the school fund lien was not in fact paid, but the amount thereof retained by the local agents. Afterwards the school fund mortgage was enforced against A. *Held*, that A had a cause of action against B for the recovery of the money. *Held*, also, that the acts of the auditor amounted to a fraudulent concealment, and the statute of limitations did not begin to run against A, the mortgagor, until knowledge came to him of the fact that said mortgage had not been paid.

Day v. Dages, 228.

AGENT—See PRINCIPAL AND AGENT.

ALTERATION OF INSTRUMENT—Insertion of words descriptive of payee not material alteration of note, see **BILLS AND NOTES**, 2; *Casto v. Evinger, 298.*

AMENDMENT—Of pleading pending trial, see **PRACTICE**, 1; *Brandt v. State, ex rel., Boyer, 311.*

ANIMALS—

1. *Running at Large.—Public Highway is Not a Public Common.—Statute Construed.*—Cattle pasturing on the public highway cannot be impounded under section 2833, Burns' R. S. 1894, which provides that "Whenever any animal shall be found running at large or pasturing upon any of the unenclosed lands or public commons of any township in any county in this State, etc., any person being a resident of said township shall be authorized to take up and impound said animal in a private or public pound within said township," as it cannot be held that a public highway is a common or an unenclosed piece of land. *Beeson, by Next Friend v. Tice, 78.*
2. *When Running at Large.—Statute Construed.*—Section 2838, Burns' R. S. 1894, making it the duty of all road supervisors "upon view or information, to cause all horses, mules, cattle, etc., running at large upon the roads, commons or unenclosed lands within their respective districts which are not authorized to run at large by order of the board of commissioners, as by law provided, to be impounded," etc., does not authorize the impounding of cattle pas-

turing on the public highway in charge of attendants, as such animals are not running at large when so attended. *Ib.*

3. *Running at Large.—Statutes In Pari Materia Construed.*—Constructing sections 2833 and 2838, Burns' R. S. 1894, together they would not prevent the pasturing of stock on the public highway if the stock at the time is in the care of some one and is not running at large, as the former section applies to commons or unenclosed lands and the latter section applies only to stock running at large. *Ib.*

ANSWER—Sufficiency of by garnishee, see PLEADING, 17; *Thompson v. Shewalter*, 290.

In an action on an accident insurance policy, see ACCIDENT INSURANCE, 3, 5; *Conboy v. Railway Officials', etc., Assn.*, 62; *Voluntary Relief Department, etc., v. Spencer*, 123.

ANTENUPTIAL CONTRACT—When antenuptial contract does not exempt the husband from liability for suitable burial expenses of wife, see HUSBAND AND WIFE, 4; *Scott v. Carothers*, 673.

APPEAL AND ERROR—When a defect in a pleading may be taken advantage of after judgment on default, see PLEADING, 20; *Albany Furniture Co. v. Merchants Nat'l. Bank, etc.*, 93.

1. *Assignment of Errors.—Complaint.*—An assignment of the insufficiency of the complaint as error is unavailing if one paragraph of the complaint is sufficient. *Axtell v. Workman*, 152.
2. *Assignment of Error.—Statute Construed.*—Under section 667, Burns' R. S. 1894, requiring that the assignment of errors shall be specific, each specification of error must be complete in itself and must in itself alone be sufficient to require the court on appeal to review some action of the court below.
Louisville, etc., R. W. Co. v. Norman, 355.
3. *Sufficiency of Complaint First Assailed by Assignment of Errors.—Statute Construed.*—The sufficiency of the facts stated in a complaint may be raised for the first time by the assignment of errors in this court under section 346, Burns' R. S. 1894, where the averment of a substantive fact has been entirely omitted therefrom.
Western Assurance Co., etc., v. Koontz, 54.
4. *Assignment of Error.—Special Finding.*—Where there is a special finding of facts and conclusions of law thereon, to present any question in the appellate tribunal as to the correctness of the conclusions of law, there must be an assignment of error that the court erred in its conclusions of law. *North British, etc., Ins. Co. v. Koontz*, 625.
5. *Assignment of Error.—As to Separate Paragraphs of Complaint.*—An assignment of error which seeks to question in the Appellate Court for the first time the sufficiency of a separate paragraph of the complaint presents no question for consideration, as nothing less than an assignment that the complaint as an entirety does not state facts sufficient will raise, for the first time on appeal, any question concerning the sufficiency of any paragraph of complaint.
Louisville, etc., R. W. Co. v. Norman, 355.
6. *Motion to Paragraph, not Available Error.*—The overruling of a motion to paragraph a complaint is not available error.
Shaw v. Ayres, 614.
7. *Exception.*—Where no exception was taken to the action of the court in sustaining a demurrer to a paragraph of answer no question is presented to this court on such ruling.
Lake Erie, etc., R. R. Co. v. Bates, 386.

8. *Bill of Exceptions.—Material Evidence Omitted From Record.*—Where the record shows that material evidence introduced by the appellee is not embodied therein, a statement in the bill of exceptions that "This was all the evidence given in said cause," will not prevail, and questions arising upon the evidence will not be considered. *German-American Insurance Co. v. Sanders, 134.*
9. *Bill of Exceptions.—Request for Written Instructions.*—When the trial judge says in the bill of exceptions that he was required by defendant to give the jury instructions in writing, and the bill shows that he did instruct in writing, and that after the giving of written instructions he gave the defendant an exception to the giving of an oral instruction, the record sufficiently shows that the request for written instructions was properly made. *Herron v. State, 161.*
10. *Record.—Longhand Manuscript.—How Incorporated in Bill of Exceptions.*—It must affirmatively appear from the record that the longhand manuscript of the evidence was filed in the clerk's office before it was embodied in the bill of exceptions, and signed by the judge. *German-American Ins. Co. v. Sanders, 134; Town of Kentland v. Hagan, 1; Chicago, etc., R. R. Co. v. Wagner, Admr., 22; Thompson v. Shewalter, 290; Fitzmaurice v. Puterbaugh, 318; Walbert v. State, 350; Louisville, etc., R. W. Co. v. Norman, 355; People's Building, etc., Assn. v. Reynolds, 453; School City of Lafayette v. Bloom, 461; Town of Worthington v. Morgan, 603; Bedford Belt R. W. Co. v. McDonald, 492.*
11. *Instructions.—Practice.*—It is not error to refuse to give to the jury an instruction offered by counsel where it is not shown that the instruction asked and refused was signed by counsel. *Houk v. Branson, 119.*
12. *Instructions, When not in Record.*—Instructions are not properly in the record where there is nothing in the record to show that they were filed, and that they were signed by the judge, and where there is no order making them a part of the record. *Fitzmaurice v. Puterbaugh, 318.*
13. *Defective Complaint not Cured by Verdict and Judgment.*—Verdict and judgment thereon will not cure a defective complaint where the averment of a substantive fact has been entirely omitted therefrom. *Western Assurance Co., etc., v. Koontz, 54.*
14. *Judgment by Default.—Sufficiency of Complaint.*—Where the sufficiency of a complaint is questioned for the first time by an assignment of error in the Appellate Court, it can not be available for the reversal of a judgment upon default, unless some fact essential to the existence of the cause of action has been wholly omitted from the complaint. *Albany Furniture Co. v. Merchants Nat'l Bank, 531.*
15. *Judgment by Default.—Presumption on Appeal.*—Where judgment was taken by default it will not be assumed on appeal that anything was proved beyond what was alleged in the complaint. *Ib.*
16. *Complaint.—Sufficiency Of.—When Defect Cured by Verdict.*—When the sufficiency of the complaint is first questioned after verdict, the court will support the complaint by every legal intendment, if there is nothing material on record to prevent it; and where a fact must necessarily have been proved at the trial to justify the verdict, and the complaint omits it, the defect is cured by the verdict, if the general terms of the complaint are otherwise sufficient to comprehend the proof. *Alcorn v. Bass, 500.*
17. *Harmless Error.*—Error cannot be predicated upon the ruling on one paragraph of a pleading, where there are other paragraphs under which the same evidence would be admissible. *Pierce v. Pierce, 107; Pacific Mutual Life Ins. Co. v. Turner, 644.*

18. *Misjoinder of Causes*.—A cause will not be reversed for any error committed in sustaining or overruling a demurrer for misjoinder of causes of action. *Fitzmaurice v. Puterbaugh*, 318.
19. *Evidence*.—On the issue as to negligence resulting in a collision between an electric car and a locomotive, it is not error to exclude the testimony of the conductor as to the instructions given him by the company as to his duties in exercising care at railroad crossings. *Hammond, etc., R. W. Co. v. Spyzchalski*, 7.
20. *Evidence*.—*Question Calling for a Mere Conclusion of Witness*.—Where on the trial of an action against an electric railway company for personal injuries sustained by plaintiff in a collision with a locomotive, a witness having testified that after the collision the conductor of defendant company took the names of the passengers, and asked if any one was hurt, it was not error to exclude the further question, as to whether "this inquiry was made loud enough for all to hear," as such question called for a mere conclusion of the witness. *Ib.*
21. *Evidence*.—On the issue as to negligence resulting in a collision between an electric car and a locomotive, where it had been shown that the motorman and conductor had been discharged after the collision, it was not error to exclude the testimony of an official of the defendant electric railway company to the effect that he had no knowledge of plaintiff's injuries for three months after the men were discharged. *Ib.*
22. *Excessive Damages*.—A verdict will not be disturbed on appeal on the ground of excessive damages, unless it is so excessive as to indicate that the jury acted from prejudice, partiality, or corruption. *Elkhart, etc., R. R. Co. v. Waldorf*, 29.
23. *Nominal Damages*.—*Harmless Error*.—The Appellate Court will not reverse a judgment of the court below for its failure to assess nominal damages. *Browning v. Simons*, 45.
24. *Special Verdict*.—*When General Assessment of Damages Controls*.—*Insurance*.—Where the jury in an action on a fire insurance policy returned a special verdict in which a description of the property destroyed was set out, together with the value of a portion of it, and also returned therewith a general assessment of damages, a judgment for the amount of the general assessment of damages will be affirmed on appeal by plaintiff where the special verdict is insufficient to authorize a judgment for as large an amount as the general assessment. *Haffeld v. Pain*, 347.
25. *Acceptance of Part Payment of Judgment Appealed from*.—*Statute Construed*.—Where a guardian tendered to his ward a certain sum of money in settlement and which was by the ward refused, and the guardian afterward made his final report and paid to the clerk the sum so tendered, less certain expenses, and the ward excepted to such report, and a trial was had in which the court rendered judgment for the ward for an amount in excess of the amount so paid to the clerk and the ward appealed therefrom, and subsequent to the rendition of such judgment, received from the clerk the amount paid by the guardian at the time of filing his report, the acceptance of such sum of money by the ward amounted to a payment on the judgment, and under the provisions of section 644, Burns' R. S. 1894, she thereby waived her right of appeal therefrom. *Martin v. Bott, Gdn.*, 444.
26. *Law of Case*.—A decision of the Appellate Court, whether right or wrong, is binding upon a subsequent appeal. *Elkhart, etc., R. R. Co. v. Waldorf*, 29.

27. *Weight of Evidence*.—The Appellate Court will not weigh the evidence nor reconcile conflicts therein.
Houk v. Branson, 119; *Wipperman v. Hardy*, 142; *Eigenman v. Eastin*, 580; *Miller v. Miller*, 605; *North British, etc., Ins. Co. v. Koontz*, 625.
28. *Waiver of Errors*.—Errors assigned but not discussed in brief are waived.
Shaw v. Ayers, 614; *North British, etc., Ins. Co. v. Koontz*, 625.
29. *Brief Must Specify the Place in Record Where Alleged Error May be Found*.—Alleged error in the admission of evidence will not be considered on appeal where no reference is made in the brief to the place in record where the evidence complained of may be found.
Smiser v. State, ex rel., King, 519.
30. *Certiorari*.—A corrected record of the trial court is properly brought to the Appellate Court by writ of *certiorari*.
Lake Erie, etc., R. R. Co. v. Bates, 386.
31. *Lost Pleading, How Brought into Record*.—*Certiorari*.—A lost pleading must, by order or leave of court under the proper proceeding therefor, be first substituted in the lower court before the Appellate Court can by writ of *certiorari* bring such pleading into the record.
Ross v. Stockwell, 77.
32. *Sufficiency of Notice to Correct Record in Court Below*.—No question can be raised in this court as to the sufficiency of notice of a motion to correct the record in the court below or the legality of any of the proceedings therein where no objection was made or exceptions taken to such proceedings
Lake Erie, etc., R. R. Co. v. Bates, 386.
33. *Notice by Publication*.—*Statute Construed*.—Under section 652, Burns' R. S. 1894, providing that appellant may have an order for notice by publication only when the appellee is shown to be a nonresident of the State, and that service of notice can not be had on his attorney of record, an appellant is not entitled to an order for the publication of notice against a nonresident appellee where the attorneys of record reside and have their office in the same city with appellant's attorneys, who know the relations of appellee's attorneys to the cause and their place of business, and no attempt has been made to serve notice upon such attorneys.
Shaefer v. Nelson, 489.
34. *Dismissal*.—Where a cause has been appealed in vacation, and has been upon the docket for ninety days, and there has been no general appearance by appellee, it will be dismissed under rule XXXV of the Appellate Court.
John V. Farwell Co. v. Newman, 649.
35. *Dismissal for Failure to File Brief*.—An appeal that has been dismissed for failure of appellant to file brief within sixty days as required by rule XIX of Appellate Court, will not be reinstated on the ground that appellant's attorney charged with the duty of preparing such brief was sick and unable to prepare the same, it not being shown why an extension of the time for filing brief was not applied for.
Cline v. Gould, 647.
36. *Rules of Appellate Court*.—*Paging of Transcript*.—*Marginal Notes*.—Rule XXX of the Appellate Court requiring transcript to be paged and the lines of each page numbered, and requiring marginal notes to be placed on the transcript indicating the several parts of the pleadings, etc., is a reasonable rule and should be strictly observed; though a failure to make marginal notes is not a cause for dismissal.
Alfred Shrimpton & Sons v. Keyes, 305.

87. *Rules of Appellate Court.—Briefs.—Waiver of Errors.*—Appellant waives all errors assigned by his failure to comply with the rules of the Appellate Court requiring that his brief shall contain a summary of the points or questions involved with the citation of authorities and an argument based thereon. *Ib.*

APPELLATE COURT—As to rules of, see **APPEAL AND ERROR**, 34, 35, 36, 37; *John V. Farwell Co. v. Newman*, 649; *Cline v. Gould*, 647; *Alfred Shrimpton & Sons v. Keyes*, 305.

1. *Jurisdiction Of.*—The Appellate Court has the right to construe and apply the constitution. It is only when the validity of the statute is involved that jurisdiction is denied.

Pittsburgh, etc., R. W. Co. v. Hays, 261.

2. *Jurisdiction Of.—Validity of Ordinances.*—An objection to an ordinance which goes only to matters of form or to irregularities in the proceedings of municipal authorities is a question that may properly be passed upon by the Appellate Court. *Ib.*

3. *Jurisdiction Of.*—Where a case appealed to the Appellate Court is found to be within the jurisdiction of the Supreme Court, by reason of the fact that a constitutional question is involved therein, the Appellate Court has no authority except to cause it to be duly certified to the Supreme Court, and if, instead of doing so, this court should proceed to determine the cause and should affirm or reverse the judgment of the court below, the judgment of this court would be void. *Ib.*

4. *Power of to Review Cause After Judgment is Certified to Trial Court.—Jurisdiction.*—Where a cause has been appealed to the Appellate Court and the judgment affirmed, and a petition for a rehearing filed and overruled, and the judgment of the Appellate Court certified to the trial court, the Appellate Court may again take the matter up, and look, not only to the opinion delivered at the original hearing, but also to the transcript of the record, and the briefs upon the original hearing, to ascertain whether the constitutionality of a statute was in question and such question duly presented on the original hearing. *Ib.*

ASSAULT AND BATTERY—See **PROVOCATION**.

ASSIGNMENT OF ERROR—

Breach of Contract.—Measure of Damages.—In an action by vendor against vendees for damages for failure and refusal to receive a certain number of books as contracted for, such contract providing that the books should consist of five different styles of binding, ranging in price according to style of binding, and such contract was silent as to the style of binding which vendee agreed to purchase, an assignment that the court erred in overruling appellants' motion on the special verdict in their favor for \$214.50, such amount being based upon the assumption that vendee was to order and receive an equal number of the five different styles of binding, is too indefinite to present any question thereon.

Browning v. Simons, 45.

ASSIGNMENTS—What amounts to an equitable assignment of a fire insurance policy, see **INSURANCE**, 11, 12; *German-American Ins. Co. v. Sanders*, 134.

ATTORNEYS' FEES—Allowance of in criminal cases by the court of the county to which a change of venue has been taken, see **COSTS**, 1, 2; *Board, etc., v. Pollard*, 470.

A school township cannot be held liable upon an attorney fee clause in a note, see **SCHOOL TOWNSHIPS**; *Snoddy v. Wabash School Tp.*, 284.

BAILMENTS—

Grain Deposited With Warehouseman.—Where a warehouseman receives grain on deposit from the owner, to be mingled with other grain in a common receptacle from which sales are made, the warehouseman keeping at all times sufficient grain of like kind and quality for the depositor, and ready for delivery to him upon demand. the contract is one of bailment *Baker v. Born*, 422.

BANKS AND BANKING—

Death of Depositor.—Fraudulent Concealment of Deposit.—A banker with whom a deposit is made is not guilty of such fraud as will make him liable in damages to the sole heir of depositor by inquiring of her after the death of depositor concerning the condition in which the business affairs of deceased were left, saying nothing about the deposit, and with knowledge of the heir's ignorance of such deposit making a demand upon her for a claim against such depositor's estate and accepting her check on another bank in payment thereof, the bank having paid the amount of the deposit upon demand and prior to the commencement of the action for damages. *Hamilton et al., Exrs., v. Toner*, 389.

BILL OF EXCEPTIONS—When statement therein that it contains all of the evidence will not prevail, see **APPEAL AND ERROR**, 8; *German-American Ins. Co. v. Sanders*, 134.

How the longhand manuscript of the evidence may be incorporated therein, see **APPEAL AND ERROR**, 10; *Town of Kentland v. Hagan*, 1; *Chicago, etc., R. R. Co. v. Wagner, Admr.*, 22; *German-American Ins. Co. v. Sanders*, 134; *Thompson v. Shewalter*, 290; *Fitzmaurice v. Puterbaugh*, 318; *Walbert v. State*, 350; *Louisville, etc., R. W. Co. v. Norman*, 355; *People's Building, etc., Assn. v. Reynolds*, 453; *School City of Lafayette v. Bloom*, 461; *Bedford Belt R. W. Co. v. McDonald*, 492; *Town of Worthington v. Morgan*, 603.

BILLS AND NOTES—Delivery of promissory note to third party, see **EVIDENCE**, 7; *Hensley, Admr., v. Tuttle*, 253.

1. *Material Alteration of Note.*—To change the payee of a note without the consent of the maker is a material alteration and avoids the note. *Casto v. Evinger*, 298.
2. *Words Descriptive of Payee.—Immaterial Alteration.*—The insertion of the words "Guardian of P. Malcom" immediately following the name of the payee of a note does not constitute a material change thereof; the words being only a description of the person. *Ib.*
3. *Guardian.—Transfer of Note by Delivery.—Action by Transferee.*—Where a guardian transfers, by delivery without indorsement, to the heirs of his deceased ward, as a part of the ward's estate, a promissory note payable to him, the heirs of deceased ward may maintain an action against the makers of the note if the original payee is made a party defendant and files a disclaimer. *Ib.*
4. *Makers of Promissory Note.—Complaint.*—In an action on a promissory note signed in the following order: "Jas. E. Stafford, Pres., J. Zapf, Mgr., Albany Furniture Co.," a complaint alleging that

the instrument sued on is the joint note of the parties, and the note filed as an exhibit recites that "we" promise to pay, etc., states a cause of action against Stafford and Zapf, as individuals.

Albany Furniture Co. v. Merchants Nat'l Bank, 531.

5. *Promissory Note.—Judgment Against Agent of Endorser.—When Erroneous.*—Where a note sued on is endorsed "S, by G," and the cause is dismissed as to S, and judgment is taken by default against the makers and "G," the judgment so taken against "G" is erroneous. *Ib.*

6. *Payment.—Note Given in Payment of Debt.*—The acceptance by a creditor of the note of a third person in full satisfaction of an existing debt is an extinguishment of the original indebtedness although the note is taken for a less sum than the whole debt.

Wipperman v. Hardy, 142.

7. *Payment.—Note Given in Payment of Debt.—Burden of Proof.*—To establish the defense of payment of a preexisting debt by the note of a third person, it is necessary for the defendant to prove that the note was given to the creditor and received by him upon the express agreement that it should be in satisfaction of the previous debt, and the burden of proof is upon the defendant setting up such defense. *Ib.*

BOARD OF PUBLIC WORKS—Jurisdiction of in Indianapolis to make assessments for the construction of a sewer, see **SEWERS**, 8; *Byram v. Foley*, 629.

BONDS—As to action on guardian's bond, see **ACTION**, 2; *Green v. Simon*, 360.

As to action by wife on saloonkeeper's bond for unlawful sale of liquor to her husband, see **INTOXICATING LIQUORS**, 4, 5, 6, 7, 8; *Brandt v. State, ex rel. Boyer*, 311; *Smiser v. State, ex rel. King*, 519.

BRIEF—As to dismissal of appeal for failure to file brief, see **APPEAL AND ERROR**, 85; *Cline v. Gould*, 647.

Errors assigned but not discussed in brief are waived, see **APPEAL AND ERROR**, 37; *Alfred Shrimpton & Sons v. Keyes*, 305.

BUILDING AND LOAN—Sufficiency of complaint to recover deposits made in building and loan association, see **COMPLAINT**, 1, 2, 3; *People's Building, Loan, etc., Assn. v. Reynolds*, 453.

CARRIERS—

1. *Passenger.*—Common carriers are required to exercise the highest degree of care, diligence, vigilance and skill in the transportation of passengers. *Hammond, etc., R. W. Co. v. Spyzchalski*, 7.

2. *Willful Injury of Trespasser by Conductor.—Liability of Company.*—Where the conductor of a passenger train, while acting within the scope of his authority in ejecting a trespasser from the train, willfully injures such trespasser, the company is liable. *Baltimore, etc., R. R. Co. v. Norris*, 189.

3. *Tender of Fare by Third Party.—Wrongful Ejection of Passenger.*—Plaintiff, in company with others, took passage upon a railroad train to go to a certain other station, not knowing at the time that the train did not stop at such station. Plaintiff offered the cash fare to the station to which he desired to go, which was refused by the conductor. A companion of plaintiff then stated

that he would pay plaintiff's fare to the next regular stopping station, and took out his money, having more than enough money to pay the fare, but the conductor refused to receive the fare and compelled plaintiff to get off the train. *Held*, that the offer to pay the fare was sufficient to make the expulsion wrongful. *Ib.*

4. *Passenger.—Offer of Fare.*—Where a person goes to a railroad station to take passage to a certain other station, and, finding the ticket office closed, gets upon the train without a ticket, and without knowledge that the train does not stop at the station to which he desires to go, he is entitled, by payment of the fare to the next regular stopping station, to remain upon the train. *Ib.*

5. *Provocation.—Ejection of Passenger.*—A railroad company cannot justify the act of its conductor in the ejection of a passenger, whose fare had been tendered, on the ground that in an altercation at the time between the passenger and the conductor, the passenger accused the conductor of violating a rule of the company on a former occasion, which violation he threatened to report to the company. *Ib.*

CERTIORARI—Lost pleading brought into the record by, see APPEAL AND ERROR, 81, *Ross v. Stockwell*, 77.

A corrected record of the trial court is properly brought to the appellate court by a writ of *certiorari*, see APPEAL AND ERROR, 30, 81; *Ross v. Stockwell*, 77; *Lake Erie, etc., R. R. Co. v. Bates*, 386.

COLLATERAL ATTACK—When the assessment for the construction of a sewer cannot be declared void in, see SEWERS, 2, 3, 4; *Byram v. Foley*, 629.

COMPLAINT—See PLEADING.

In an action on account for goods sold to defendant's agent, see PLEADING, 11; *Fry v. Colborn*, 96.

When in an action for breach of contract complaint need not allege performance by plaintiff, see CONTRACTS, 10, 11; *Romel v. Alexander*, 257; *People's Building, Loan, etc., Assn. v. Reynolds*, 453.

In an action on gas lease, see PLEADING, 12; *Indianapolis Natural Gas Co. v. Spaugh*, 683.

In an action on an insurance policy, where the company claims a forfeiture, see INSURANCE, 3; *Union Central Life Ins. Co. v. Jones*, 592.

Omission of averment as to ownership of property in an action on a fire insurance policy renders complaint fatally defective, see INSURANCE, 9; *Western Assurance Co., etc., v. Koontz*, 54.

Sufficiency of in an action on an accident insurance policy, see PLEADING, 13; *Pacific Mut. Life Ins. Co. v. Turner*, 644.

Sufficiency of in an action against a railroad relief association, see ACCIDENT INSURANCE, 4; *Voluntary Relief Department, etc., v. Spencer*, 123.

Sufficiency of in an action for conversion against a warehouseman, see CONVERSION, 2, 3; *Baker v. Born*, 422.

Sufficiency of in an action to enforce drainage assessment lien, see DRAINAGE, 1, 2, 3, 4; *Hoefgen v. State, ex rel. Brown*, 537.

- For the collection of assessments for the construction of a sewer, see SEWERS, 1; *Byram v. Foley*, 629.
- Sufficiency of in an action for damages for personal injuries, see PLEADING, 9; *Chicago, etc., R. R. Co. v. Wagner, Admr.*, 22.
- In an action against a railroad company for an injury resulting from a defective roadbed, see RAILROADS, 1, 2; *Chicago, etc., R. R. Co. v. Lee, Admr.*, 215.
- Sufficiency of in an action for slander, see PLEADING, 14; *Alcorn v. Bass*, 500.
- In an action against a telegraph company for failure to deliver a message, see TELEGRAPH COMPANIES, 1; *Western Union Tel. Co. v. Bryant*, 70.
- In an action for willful injury, see PLEADING, 10; *Miller v. Miller*, 605.
- Overruling of motion to paragraph, not available error, see APPEAL AND ERROR, 5, 6; *Louisville, etc., R. W. Co. v. Norman*, 355; *Shaw v. Ayers*, 614.
- Defective complaint, how affected by verdict and judgment, see APPEAL AND ERROR, 13, 16; *Western Assurance Co. etc., v. Koontz*, 54; *Alcorn v. Bass*, 500.
- Amendment of pending trial, see INTOXICATING LIQUORS, 4; *Brandt v. State, ex rel. Boyer*, 311.
- When sufficiency of may first be assailed by assignment of errors, see APPEAL AND ERROR, 3; *Western Assurance Co. etc., v. Koontz*, 54.
1. *Sufficiency of in an Action to Recover Deposits Made in a Building and Loan Association.—Demand.*—An averment in a complaint in an action to recover from a building and loan association deposits made by plaintiff, which avers that defendant neglected, failed and refused to return the sums of money paid, are equivalent to a positive allegation that a demand had been made, and a return thereof refused.
People's Building, Loan, etc., Assn. v. Reynolds, 453
 2. *Need Not Aver an Offer to Return Certificate in an Action to Recover Funds Deposited in a Building and Loan Association.*—In an action to recover deposits made in a building and loan association under a certificate of stock, which, by the terms thereof, had been forfeited by nonpayment of installments, need not show an offer on plaintiff's part to return the certificate, where such certificate was brought into court as the basis of the action. *Ib.*
 3. *Sufficiency of in an Action to Set Aside Sale of Letters Patent on the Ground of Fraud.*—A complaint in an action to set aside the sale of certain letters patent which alleges that defendants were the owners of such letters patent, that they conspired with a third party and thereby induced plaintiff to purchase and pay \$1,200.00 for the letters patent upon the representation that other parties, whom said third party pretended to represent, were ready and willing to take the same from him at an agreed price, should he procure the same, and which also alleged that plaintiff stated to defendants that the letters patent, if purchased, would be of no value to him and that defendants knew that plaintiff was purchasing same for the sole purpose of conveying same to the persons represented by said third party, contains facts sufficient to constitute a cause of action against defendants.
Hay et al. v. Landis, 91.

4. *School Supplies.—Averment as to Necessity Of.*—Where a complaint against a school township to recover for supplies sold to the trustee thereof shows on its face that the supplies purchased and delivered to the township are wholly unauthorized by law, such complaint cannot be made good by an averment that such supplies were useful and necessary for the thorough organization and efficient management of such schools.

First Nat'l Bank, etc., v. Adams School Tp., 375.

CONSIDERATION—Mere inadequacy of is not sufficient to defeat a contract, see **CONTRACTS**, 1; *Pierce v. Pierce, 107.*

A promise to do what the promisor is under previous obligation to do is insufficient as a consideration for an agreement of which it constitutes a part, see **CONTRACTS**, 2; *Sargent v. Robertson, 411.*

CONTINUANCE—Application for addressed to the sound discretion of the court, see **PRACTICE**, 1, 2; *Brandt v. State, ex rel., Boyer, 311.*

CONTRACTOR—Action by to enforce the collection of assessment for the construction of a sewer, see **SEWERS**, 4; *Byram v. Foley, 629.*

Meaning of the Term.—A contractor is one who agrees to do a piece of work for another on his own responsibility and credit.

Caulfield v. Polk, 429.

CONTRACTS—Respective remedies for breach of executed and executory contracts, see **SALES**, 2; *Branigan v. Hendrickson, 198.*

Power of school board to revoke contract with teacher, see **SCHOOLS**; *School City of Lafayette v. Bloom, 461.*

1. *Consideration.*—Mere inadequacy of consideration is not sufficient to defeat a contract. *Pierce v. Pierce, 107.*

2. *Consideration.*—A promise to do what the promisor is under a previous valid, legal obligation to do, is insufficient as a consideration for an agreement of which it constitutes a part.

Sargent v. Robertson, 411.

3. *Valid and Illegal Considerations in Same Contract.*—Where valid and illegal considerations in the same contract are susceptible of division, that part of the consideration which is legal may be enforced. *Pierce v. Pierce, 107.*

4. *Executory.*—*May be Abandoned by Agreement of all the Parties.*—A contract which is wholly executory may be abandoned by the agreement of all the parties, the renunciation of each party of his rights under the contract being a sufficient consideration for his release from obligation by the other parties.

Sargent v. Robertson, 411.

5. *Whether Executed or Executory a Question of Fact.*—Whether any particular contract is executed or executory is generally a question of fact depending upon the intention of the parties to be gathered from the terms and stipulations of the agreement.

Branigan v. Hendrickson, 198.

6. *Between Employer and Employee.—Construction.*—A contract of employment, whereby the defendants agreed to pay plaintiff \$25.00 per month for a period of three months, "as it would take plaintiff that long to learn the business of defendants; that after said time defendants could afford to pay plaintiff more," in the absence of a new contract did not entitle plaintiff to wages in excess of \$25.00 per month for the time he remained in defendants employment after the expiration of the three months. *Munchoff v. Ford, 131.*

7. *Guaranty.—Notice.—Acceptance.*—An agreement in the words :
 “Gentlemen—R. E. Emerson, of Pueblo, Colorado, desires to make purchases from your firm. I will engage to secure sales you make to the above named, in the sum of \$300.00.” is not a strict guaranty, but an original undertaking, and in an action based thereon it is unnecessary to aver or prove notice of acceptance thereof.
Newcomb Brothers Wall Paper Co. v. Emerson, 482.
8. *Breach Of.—Nominal Damages.*—Where there has been a breach of contract by one of the parties thereto, the other is at least entitled to recover nominal damages for such breach.
Browning v. Simons, 45.
9. *Breach Of.—Measure of Damages.*—Where a contract is made for the sale and delivery of personal property and the vendee refuses to receive the same at the time and place of the delivery thereof, the measure of damages is the difference between the contract price and the market value at such time.
Ib.
10. *Complaint for Breach of, When Need Not Aver Performance by Plaintiff.*—An action may be maintained for breach of contract, without alleging performance on the part of plaintiff, where the plaintiff's covenant or stipulation constitutes only a part of the consideration, and the defendant has received a partial benefit, and the plaintiff's breach might be compensated in damages.
Romel v. Alexander, 257.
11. *Breach Of.—When Complaint Need Not Allege Performance on the Part of Plaintiff.*—In an action for breach of a contract containing reciprocal covenants or mutual conditions to be performed, and one of the parties puts it out of, or beyond the power of the other to perform the covenants or conditions to be performed by him, the latter is thereby relieved from such performance, and if the complaint avers such facts it will not be demurrable for failure to allege performance on the part of plaintiff.
People's Building, etc., Assn. v. Reynolds, 453.

CONTRIBUTORY NEGLIGENCE—Of passenger in alighting from train, see RAILROADS, 6, 7; *Louisville, etc. R. R. Co. v. Espenscheid, 558; Cincinnati, etc., R. R. Co. v. Revalee, 657.*

CONVERSION—

1. *Plaintiff Must be the Owner or Entitled to Possession.*—A person cannot maintain an action for conversion where he neither owns nor is entitled to possession of the property alleged to be converted.
Baker v. Born, 422.
2. *Sufficiency of Complaint in Action Against Warehouseman.*—In an action against a warehouseman for the conversion of certain corn deposited with him, the complaint should allege that prior to the commencement of the action defendant did not have a sufficient quantity of corn of the kind and quality deposited with him with which to meet a demand by plaintiff; that a demand was made; that storage charges and expenses were tendered, or that storage charges had not attached.
Ib.
3. *Complaint in Action Against Warehouseman.*—An allegation in a complaint in an action against a warehouseman for conversion of a quantity of corn deposited with him, that on and before a specified date defendant had no corn in his warehouse or under his control, of the quality of plaintiff's corn deposited prior to a specified earlier date, but had sold such corn, is not equivalent to an allegation that on a day certain the defendant did not have in his warehouse sufficient corn of the kind and quality deposited by plaintiff.
Ib.

CORPORATIONS—As to power of general officers of a railroad company to employ medical attendance for injured workmen, see RAILROADS, 3, 4; *Bedford Belt R. W. Co. v. McDonald*, 492.

1. *Contract.—Ultra Vires.*—Where a private corporation has entered into a contract not immoral in itself and not forbidden by any statute, and it has been, in good faith, fully performed by the other party, the corporation will not be heard on a plea of *ultra vires*. *Ib.*

2. *Action Against a Foreign Corporation by Its Agent.—Jurisdiction.—Statutes Construed.*—Under sections 3453 and 3454, Burns' R. S. 1894, providing that agents of foreign corporations shall deposit in the county clerk's office the power of attorney or other authority by virtue of which they act, and that such agents shall procure from such corporations and file with the clerk a duly authenticated order or resolution of the managers of such corporations, authorizing any "citizen or resident" of this State having a claim against such corporation, arising out of any transaction in this State with "such agents", to maintain in this State an action thereon, an agent of a foreign corporation can not maintain an action against such corporation on a check drawn to his order and payable in a foreign state.

Byers v. Union Central Life Ins. Co., 101.

3. *Action Against a Foreign Insurance Company by Its Agent.—Jurisdiction.—Statute Construed.*—Under section 4916, Burns' R. S. 1894, providing that it shall be unlawful for a foreign insurance company to do business in this State until it has filed with the Auditor of State a certified order of the board of directors of such company consenting that service of process in any court against such company may be served on any authorized agent of the company in the State while any liability remains outstanding against the company in the State, an agent of a foreign insurance company can not maintain an action against such company on a check drawn to the order of such agent and payable in another State. *Ib.*

COSTS—As to payment of before bringing another action for same cause, see ACTION, 3, 4; *Eigenman v. Eastin, Admx.*, 580.

1. *Attorney's Fees.—Allowance of in Cases of Change of Venue —Statutes Construed.*—An allowance made to attorneys who have been appointed to assist in the prosecution or defense of a criminal cause by the court of the county to which a change of venue has been taken and in which the trial thereof was had under sections 1847, 1848, Burns' R. S. 1894, is not conclusive against either the claimants or the county from which the cause was removed; the amount so fixed is only *prima facie* evidence of the correctness of the sum allowed and may be inquired into by either party.

Board, etc., v. Pollard, 470.

2. *Attorney's Fees.—Change of Venue.—Jurisdiction.*—Where an allowance has been made to attorneys for assisting in the prosecution and defense of a criminal cause by the court of a county to which a change of venue had been taken, and the cause tried, and thereafter such claims were allowed in part by the board of commissioners of the county from which the cause was removed, such county will not be bound by a judgment of the court of the county to which the change of venue had been taken, made thereafter on petition of the claimants. *Ib.*

COUNTY—When township trustee may bind county for medical aid to poor, see TOWNSHIP TRUSTEE, 2; *Board, etc., v. Galloway*, 689.

COUNTY CLERK—See OFFICERS.

CRIMINAL LAW—

1. *Former Jeopardy.—Constitution Construed.*—The jeopardy prohibited in the provision of the State Constitution that, "No person shall be put in jeopardy twice for the same offense," is that which grows out of the same offense, not necessarily of the same act or transaction. *State v. Gapen, 524.*
2. *Affidavit.—Duplicity.—Motion to Quash.*—When duplicity in an affidavit clearly exists, it is sufficient ground for sustaining a motion to quash. *Herron v. State, 161.*
3. *Affidavit.—Duplicity.*—Before an affidavit can be held bad for duplicity there must be a joinder of two or more separate and distinct offenses in one and the same count. *Ib.*
4. *Intoxicating Liquors. — Affidavit. — Duplicity.* — An affidavit charging a violation of section 4, Act of March 11, 1895, prohibiting, during such days and hours when the sales of intoxicating liquors are unlawful, the maintaining of screens obstructing the view of a room in which such liquors are sold, is not bad for duplicity because it contains some, though not all, of the averments necessary to charge an offense under another and different statute. *Ib.*
5. *Sale of Intoxicating Liquors to Minor Without License.—Separate Offenses.—Statute Construed.*—A sale of intoxicating liquor without license, and to a minor constitutes two separate offenses under section 7285, Burns' R. S. 1894, and section 5323, Horner's R. S. 1896 (Acts 1895, p. 250, section 6), respectively, and a prosecution for the former offense will not constitute a bar to the latter, although both violations grew out of the same act or transaction. *State v. Gapen, 524.*
6. *Agent of Foreign Insurance Company Doing Business Without Authority.—Sufficiency of Affidavit.*—An affidavit charging defendant with unlawfully doing business as agent of a "certain foreign insurance company of a state other than the State of Indiana," is insufficient to charge an offense, under section 4915, Burns' R. S. 1894, making it unlawful for any agent of any insurance company incorporated in any other state than the State of Indiana, to transact business in this State without first producing a certificate of authority from the State Auditor. *State v. Campbell, 442.*
7. *Trial Not Concluded Until Judgment is Rendered.*—In a criminal cause the trial is not concluded until judgment is rendered; and until that time the power of the court to extend the time of making out and presenting a bill of exceptions is not exhausted. *Herron v. State, 161.*

DAMAGES—Error in assessment of how questioned, see PRACTICE, 13; *Louisville, etc., R. R. Co. v. Renicker, 619.*

When may be recovered in an action against a telegraph company for negligence causing mental anguish only, see TELEGRAPH COMPANIES, 1; *Western Union Tel. Co. v. Bryant, 70.*

Breach of contract by one of the parties thereto entitles the other to recover at least nominal damages, see CONTRACTS, 8; *Browning v. Simons, 45.*

Measure of for breach of contract for purchase of personal property by vendee, see CONTRACTS, 9; *Ib.*

Measure of in an action against landlord for failure to make repairs agreed to, see LANDLORD AND TENANT, 1; *Taylor v. Lehman*, 585.

Measure of in an action for unreasonable diversion of water from lake, see WATERS, 3; *Valparaiso City Water Co. v. Dickover*, 233.

When a judgment will not be reversed on appeal on the ground of excessive damages, see APPEAL AND ERROR, 22; *Elkhart, etc., R. Co. v. Waldorf*, 29.

A judgment will not be reversed for failure to assess nominal damages, see APPEAL AND ERROR, 23; *Browning v. Simons*, 45.

When Not Excessive.—A verdict for \$400.00 against a railway company for carrying a young and inexperienced girl beyond her station to a point where she could not safely alight, and then instead of returning to such station as promised, carrying her half a mile beyond another station, at which the conductor also promised to stop, is not, as a matter of law, excessive.

Louisville, etc., R. R. Co. v. Renicker, 619.

DECEDENT'S ESTATES—

Claim of mother for caring for her adult son, see PARENT AND CHILD, 1, 2; *Jessup v. Jessup, Admr.*, 177.

DRAINAGE—

1. *Action to Enforce Assessment Lien.—Complaint.*—In an action, under act of April 6, 1885, to enforce a drainage assessment, a complaint which shows that the petition for the construction of the drain was referred to the drainage commissioners, that they made a report and finding that defendant owned certain lands that would be benefited thereby in certain specified sums, and that the report so made was approved and confirmed by the judgment of the court, sufficiently sets out the assessment to make the complaint good against a demurrer. *Hoefgen v. State, ex rel. Brown*, 537.

2. *Assessment Lien.—Complaint.*—In an action to enforce a drainage assessment lien, it is not necessary that it be averred in the complaint that a notice of the assessment of benefits was recorded in the recorder's office. *Ib.*

3. *Assessment Lien.—Complaint.*—The complaint in an action to enforce a drainage assessment lien need not aver that the drain was made according to the plans and specifications. *Ib.*

4. *Assessment Lien.—Complaint.*—It is not necessary that the complaint, in an action to enforce a drainage assessment lien, aver that all the amount of benefits assessed against defendant's land is needed to pay the expenses and costs of construction. *Ib.*

ESTRAYS—See ANIMALS.

EVIDENCE—As to impeachment of witness, see PRACTICE, 6; *Houk v. Branson*, 119.

As to admissibility of an answer to a question calling for mere conclusion of witness, see APPEAL AND ERROR, 20; *Hammond, etc., R. W. Co. v. Spyzchalski*, 7.

As to admissibility of employer's instructions to employe in an action for negligence, see APPEAL AND ERROR, 19; *Ib.*

1. *Assumption of Risk.—Burden of Proof.*—In an action for the death of an employe the burden is on plaintiff to show that decedent did not assume the risk of the danger.

Chicago, etc., R. R. Co. v. Wagner, Admr., 22.

2. *Variance Between Pleading and Proof.*—In an action by a passenger for personal injuries proof that such passenger, while standing on the lowest step of a car waiting for the train to stop, was thrown from the car by a sudden starting of the train, is not a material variance from a complaint alleging that the train had stopped but started with a sudden jerk before she had the time to alight, and threw her upon the platform. HENLEY and WILEY, JJ. Dissenting. *Cincinnati, etc., R. R. Co. v. Revalee*, 657.
3. *Parol Testimony not Admissible to Vary Written Contract.*—Parol testimony is not admissible to vary the terms of a written contract which is complete in itself and free from ambiguity. *Singer Mfg. Co. v. Sults*, 639.
4. *Admissibility of Testimony of Shorthand Reporter from Notes of Former Trial.*—The official shorthand reporter may testify from recollection, refreshed by her notes as to statements made by a witness at a former trial reported by her. *Hauk v. Branson*, 119.
5. *Repairs Made After Injury.*—Evidence of repairs made after the injury is not admissible to show prior negligence. *Chicago, etc., R. R. Co. v. Lee, Admr.*, 215.
6. *Endorsement on Note.*—Where a note, payable at maker's death, was placed by the maker in the hands of a third person, and endorsed as follows: "Both parties agreed, left in possession of Alfred Jones," it is not error to admit the endorsement in evidence, it being shown that the endorsement was made at the time the note was executed and in the presence of the payee. *Hensley, Admr, v. Tuttle*, 253.
7. *Delivery of Note to Third Party.—Endorsement as Evidence.*—The endorsement on a note, "Both parties agreed, left in possession of Alfred Jones," it being shown that the note was left with the third party, is sufficient to sustain a finding that the note was delivered. *Ib.*
8. *Where a Witness is Asked to Repeat a Conversation.*—A witness who is asked to repeat a conversation had at some previous time must give the conversation as it occurred, or the substance of it, and leave the court or jury to determine what the parties intended. *Elkhart, etc., R. R. Co. v. Waldorf*, 29.
9. *Insurance.—Tables of Expectancy.*—Life insurance tables of expectancy are admissible in evidence, to be considered by the jury in connection with all other pertinent evidence in ascertaining the probable duration of the life in question, and not as fixing the expectancy of the life of the particular person, or as forming a legal basis for a calculation. *Smiser v. State, ex rel., King*, 519.
10. *Proper Admission Of in Rebuttal.*—Where on the trial of an action against an electric railway company for personal injuries sustained by plaintiff in a collision of an electric car with a locomotive at a crossing, the motorman in charge of the defendant's car at the time of the collision testified as a witness for defendant that there was between him and the approaching locomotive a watchman's shanty, testimony that the shanty did not obstruct the motorman's view was properly admitted in rebuttal. *Hammond, etc., R. W. Co. v. Spyzchalski*, 7.
11. *Rebuttal.*—Where in an action for personal injuries resulting in a miscarriage, the plaintiff's physician testified only as to plaintiff's general physical condition, and a medical witness for defense testified as to certain physical conditions which would tend to pro-

duce the miscarriage, it was proper to permit plaintiff's physician to testify on rebuttal, to the effect, that the physical conditions mentioned by defendant's witness did not produce the injury complained of. *Ib.*

12. *Opinion.*—Where the facts were fully placed before the jury, it was not error to exclude opinion evidence based thereon, where an opinion could have been readily formed by the jurors.

Elkhart, etc., R. R. Co. v. Waldorf, 29.

18. *Opinion of Witness as to How Accident Occurred.—Demonstration in Presence of Jury.*—The statement of a witness of how he at some other time had concluded that an accident must have happened, accompanied by a demonstration in the presence of the jury is not admissible.

Chicago, etc., R. R. Co. v. Lee, Admr., 215.

EXEMPTION—Guardian may have from judgment taken on bond, see ACTION, 2; *Green v. Simon, 360.*

1. *Statutes Liberally Construed.*—Statutes providing for exemptions are liberally construed. *Ib.; Kolb v. Raisor, 551.*
2. *Residence of Execution Debtor.—Schedule Filed by Wife in Absence of Husband.—Statute Construed.*—Where an execution debtor, to avoid criminal process, leaves the house where he has resided with his family, and his whereabouts are unknown, such debtor does not thereby lose his residence so as to deprive his wife from filing schedule and reserving for him a householder's exemption, as provided in section 715, Burns' R. S. 1894.

Green v. Simon, 360.

3. *Disposition of Exempt Property Not Fraud.*—A debtor's disposition of property exempt to him as a householder cannot be fraudulent as to his creditors.

Kolb v. Raisor, 551.

FIRES—Escaping from railroad right of way, see RAILROADS, 9, 10; *New York, etc., R. R. Co. v. Grossman, 652.*

FRAUD—Sufficiency of complaint to set aside sale of letters patent on the ground of fraud, see COMPLAINT, 3; *Hay et al. v. Landis, 91.*

A debtor's disposition of property exempt to him as a householder cannot be fraudulent as to his creditors, see EXEMPTION, 3; *Kolb v. Raisor, 551.*

Sale.—Damages.—Where the vendor of a second-hand steam boiler falsely and knowingly represents to the purchasers thereof that the boiler had been used just enough to be thoroughly tested and was as good as new, when in fact it was old and worthless, and unsafe for any purpose, and such representations were relied upon by the purchasers, the vendor must answer for any damages sustained by the purchasers resulting from the inherent defects in the boiler.

Fitzmaurice v. Puterbaugh, 318.

GARNISHMENT—As to refusal of court to permit answer by principal defendant after default, see PLEADING, 18; *Thompson v. Shewalter, 290.*

1. *Motion to Discharge Garnishee Defendant.*—A motion to dismiss as to garnishee defendant is equivalent to a motion for judgment on the pleadings, and admits all facts pleaded and every legitimate inference to be drawn therefrom; but the facts set out in the motion and in the statement filed in support thereof cannot be considered as true unless such facts had also been set up in the pleadings.

Rigney v. Jacobs, 545.

2. *Assignment of Policy for Collection.—Insurance Company as Garnishee.*—The assignment of a fire policy, after loss, the assignment being merely in trust for collection, does not exempt the insurance company from garnishment at the instance of a creditor of the insured. *Ib.*
3. *Assignment of Policy to Nonresident, After Service of Writ.*—An insurance company is not entitled to a discharge of garnishment proceedings against it because it appears by the pleadings of the adverse party that another garnishee defendant to whom the claim against the company had been assigned in trust for collection, has sold and delivered the policy to a nonresident of the State. *Ib.*

GUARDIAN AND WARD—As to action on guardian's bond, see ACTION, 2; *Green v. Simon*, 360.

Appointment of Guardian for Person Alleged to be of Unsound Mind. When Void.—When a Guardian Illegally Appointed may be Regarded as Trustee.—The appointment of a guardian for a person alleged to be of unsound mind, where the appointment is made without service of process upon, and in the absence of such person is null and void; but one so appointed as guardian acts under color of right and will be regarded as a trustee and will have an equitable right to be reimbursed for all reasonable expenses properly incurred in the execution of the trust. *Jessup v. Jessup, Admr.*, 177.

GUARANTY—Original undertaking distinguished from, see CONTRACTS, 7; *Newcomb Brothers Wall Paper Co. v. Emerson*, 482.

HARMLESS ERROR—Error cannot be predicated upon the ruling on one paragraph of a pleading, where there are other paragraphs under which the same evidence would be admissible, see APPEAL AND ERROR, 17; *Pierce v. Pierce*, 107; *Pacific Mutual Life Ins. Co. v. Turner*, 644.

HIGHWAYS—

Railroad Right of Way May be Assessed for Improvement Of.—The right of way of a railway company may be assessed for the improvement of highways. *Pittsburgh, etc., R. W. Co. v. Hays*, 261.

HUSBAND AND WIFE—

1. *Burial Expenses of Wife.—Necessaries.*—Suitable burial expenses for a deceased wife are necessities that should be furnished by surviving husband. *Scott v. Carothers*, 673.
2. *Abandonment of Wife, When Husband Liable for Necessaries.*—Where a husband by his cruel and inhuman treatment forces his wife to abandon his home, he is legally bound to one who supplies her with necessities. *Ib.*
3. *Abandonment.—Liability of Husband for Burial Expenses of Wife.*—Where a husband by his cruel and inhuman treatment has forced his wife to abandon his home, and, while living separate and apart, she dies, the husband will be liable for her suitable burial expenses, although at the time of her death the wife was the owner of separate property more than sufficient to have paid such expenses. *Ib.*
4. *Necessaries.—Antenuptial Contract.*—An antenuptial contract which is simply directed to the disposition of the separate property of a husband and wife after death, does not exempt the husband from liability for suitable burial expenses upon the death of the wife. *Ib.*

5. *Earnings of Wife.—Services Rendered by Husband and Wife Jointly.*—The common law rule that the earnings of the wife belong to the husband is still in force in this State, except in cases where she carries on a separate business, or labors for others on her own account; and where she assists her husband in nursing and caring for an aged person, such work being in line of household duties, the husband may recover in an action for the services rendered by himself and wife. *Hensley, Admr., v. Tuttle, 253.*

IMPROVEMENTS—See MUNICIPAL CORPORATIONS.

Of street adjoining railroad right of way, see STATUTORY CONSTRUCTION; *Pittsburgh, etc., R. W. Co. v. Hays, 261.*

As to assessments for the construction of sewers, see SEWERS, 1, 2, 3, 4, 5; *Byram v. Foley, 629.*

As to assessments for collateral drains, see SEWERS, 1; *Ib.*

As to double sewer assessments, see SEWERS, 5; *Ib.*

As to irregularities in the proceedings of city council in ordering public improvements, see MUNICIPAL CORPORATIONS, 7; *Pittsburgh, etc., R. W. Co. v. Hays, 261.*

Assessments for street and other improvements are upheld upon the theory that each lot or tract of land is benefited in a sum equal to the assessment, see MUNICIPAL CORPORATIONS, 2; *Becker v. Baltimore, etc., R. W. Co., 324.*

INSANE PERSONS—Appointment of guardian for, when void, see GUARDIAN AND WARD; *Jessup v. Jessup, Admr., 177.*

INSTRUCTIONS—Not error to refuse to give instruction not signed by counsel, see APPEAL AND ERROR, 11; *Houk v. Branson, 119.*

When not properly in the record, see APPEAL AND ERROR, 12; *Fitzmaurice v. Puterbaugh, §18.*

1. *All Construed Together.*—If the instructions given, all taken together, present the law correctly and are not calculated to mislead the jury, the judgment will not be reversed. *Todd v. Danner, 368.*
2. *Must be Predicated Upon all the Evidence.*—An instruction must be predicated upon all the evidence given in the case on the particular matter to which it is directed. *Ib.*
3. *As to Preponderance of the Evidence.*—An instruction to the jury that a fact or facts necessary to a recovery must appear from the plaintiff's evidence, is not equivalent to instructing the jury that a fact or facts must be proved by a preponderance of the evidence, where there was evidence introduced both by plaintiff and defendant. *Ib.*
4. *Incomplete Instructions.—Remedy.*—An objection to an instruction by the court on the ground that it does not contain a full statement of the law applicable to the case, can be made available only by the aggrieved party asking the court for additional instruction to supply the supposed omission in the one given. *Ib.*
5. *As to Evidence Equally Balanced.*—An instruction that if upon a fact the evidence is equally balanced, that fact is not proved and should not be stated in the special verdict, is proper. *Voluntary Relief Department, etc., v. Spencer, 123.*
6. *Direction as to Form of Verdict not an Instruction.—Statute Construed.*—Where the jury had already been instructed as to

the punishment they might inflict if they found the defendant guilty, an instruction setting out the forms of verdict that might be returned, is not an instruction within the meaning of section 1892, Burns' R. S. 1894, subd. 5, requiring the court to instruct the jury in writing upon request made at any time before the commencement of the argument. *Herron v. State*, 161.

INSURANCE—See ACCIDENT INSURANCE.

Tables of expectancy as evidence, see EVIDENCE, 9; *Smiser v. State*, *ex rel. King*, 519.

Sufficiency of affidavit to charge defendant with unlawfully acting as agent of a foreign insurance company doing business without authority, see CRIMINAL LAW, 6; *State v. Campbell*, 442.

1. *Policy Susceptible of Two Interpretations*.—Where a policy is susceptible of two interpretations, the one giving greater indemnity and sustaining the claim, will be adopted by the court.

Union Central Life Ins. Co. v. Jones, 592.

2. *Policy with Inconsistent Provisions*.—Where a policy contains inconsistent provisions, that which is most favorable to the insured will be adopted. *Ib.*

3. *Forfeiture.—Pleading.—Answer*.—In an action on an insurance policy, where the company claims a forfeiture, it is not necessary that the complaint aver that the company had not pursued the proper method for the forfeiture of the policy. It devolved upon the company to show by affirmative answer that it had done so. *Ib.*

4. *Forfeiture.—Waiver*.—Under a policy of insurance giving the company the election to cancel the policy upon the insured's failure to pay any premium note at maturity, and providing that upon cancellation all premium notes not then due shall be surrendered to insured, the company waives the forfeiture by treating the policy as still in force, notwithstanding a cancellation on its books, and enforcing collection of notes not due at the time of such cancellation. *Ib.*

5. *Contract.—Forfeiture*.—The conditions of a policy upon which it is sought to base a forfeiture will be construed most strongly against the insurance company, and a forfeiture will not be enforced unless its enforcement is clearly demanded by the established rules for the construction of written contracts. *Ib.*

6. *Policy is a Contract Between the Insured and Insurer*.—Where the insured accepts his policy, which is his contract, with the knowledge of all of its conditions and stipulations, and at the time of his acceptance takes it with knowledge of a breach thereof on his part, and in the absence of knowledge thereof on the part of insurer, he cannot afterward be heard to complain.

Shaffer v. Milwaukee Mechanics Ins. Co., 204.

7. *Contract.—Condition.—Forfeiture*.—A condition in a policy of insurance, "This entire policy of insurance, unless otherwise provided by agreement endorsed thereon or added thereto, shall be void * * * if the subject of insurance be personal property and be or become incumbered by a chattel mortgage," avoids the policy, where at the time of the issuance of the policy there existed a chattel mortgage on the property embraced in the policy of insurance, the insurer having no knowledge of the existence thereof. *Ib.*

8. *Forfeiture.—Condition as to Mortgage.—Record of Mortgage not Notice to Insurer of the Existence Thereof*.—The rule that

where the law requires an instrument under seal to be recorded in a public record that such record is notice to all the world, does not apply to insurance companies that issue policies of insurance with express conditions that the policy shall be void, if the property is, or shall become mortgaged; the insurer is not required to examine the public records to ascertain whether or not the insured is violating a stipulation in his policy by which he must be bound. *Ib.*

9. *Complaint Must Contain Averment as to Ownership of Property.—Defect not Cured by Verdict and Judgment.*—The omission from a complaint, in an action on a fire insurance policy, of an averment as to the ownership of the property, renders the complaint fatally defective and a verdict and judgment thereon will not cure it, there being no foundation for a valid judgment.

Western Assurance Co., etc., v. Koontz, 54.

10. *Transfer of Policy.—When Transfer in Writing May be Waived.*—Where a fire insurance policy provides that the consent of the company to transfer same must be endorsed on the policy such provision must be complied with unless waived, either expressly or by implication.

German-American Ins. Co. v. Sanders, 134.

11. *Transfer of Policy.—Equitable Assignment.*—A complaint in an action on a fire insurance policy which alleges that at the time of the conveyance of the real estate on which the insured buildings were situated, the insurance company was notified thereof and consented and agreed that the policy of insurance should become payable to the grantee in case of loss; that it agreed to endorse the fact of said transfer in writing upon the policy, but that it neglected and failed to do so; and that the company then agreed that it would waive the endorsement on said policy, and that it should be valid, and payable to said grantee, states facts sufficient to show an equitable assignment of the policy to the grantee of the real estate.

Ib.

12. *Assignment of Policy.—Waiver Of.*—Where an insurance company accepts the premium for unearned insurance on a fire policy, with knowledge that the real estate on which the insured buildings are situated has been conveyed, and having consented at the time of the conveyance that the loss, if any, should be payable to the grantee, the provision in such policy that the consent to the transfer must be in writing, endorsed on the policy, is thereby waived.

Ib.

INTERROGATORIES TO JURY—The allowing or refusal to allow any interrogatory to jury may be objected to by counsel, and the exception to the ruling saved by bill of exceptions, see PRACTICE, 8; *Town of Kentland v. Hagan, 1.*

As to indefinite answers returned by jury, see PRACTICE, 11; *Hammond, etc., R. W. Co. v. Spyzchalski, 7.*

As to conflict between general verdict and answers to interrogatories, see PRACTICE, 9, 10; *Fitzmaurice v. Puterbaugh, 318.*

INTOXICATING LIQUORS—Sufficiency of affidavit in an action against a saloonkeeper for allowing a minor to loiter in a saloon, see AFFIDAVITS; *Walbert v. State, 350.*

Sufficiency of affidavit in prosecution for maintaining screens and obstructing view to saloon in violation of law, see CRIMINAL LAW, 4; *Herron v. State, 161.*

Prosecution for selling intoxicating liquors without a license will

not constitute a bar to selling liquor to a minor, although both violations grew out of same act or transaction, see **CRIMINAL LAW**, 5; *State v. Gapen*, 524.

1. *License Not a Contract.*—A license to engage in the liquor traffic is not a contract, but a mere permit, and the applicant who receives it does so with the knowledge that it is at all times within the control of the legislature. *Nelson v. State*, 403.
2. *License to Sell Not Transferable.*—A license to sell intoxicating liquors at retail is not transferable. *Pierce v. Pierce*, 107.
3. *Sales Made by Bartender.—Liability of Principal.—Statute Construed.*—A saloonkeeper is not liable on his bond, under the provisions of section 7279, Burns' R. S. 1894, for the payment of fines and costs assessed against his bartender for an unlawful sale of intoxicating liquor, made by such bartender without the knowledge or consent of his principal. *State, ex rel., Denney v. Leach*, 174.
4. *Sale to Husband While Intoxicated.—Action on Bond.—Amendment of Complaint Pending Trial.*—In an action on the bond of a retail liquor dealer, brought by a wife for damages caused by a sale of liquor to her husband while intoxicated, in violation of section 15 of the act of March 17, 1875 (Acts 1875, p. 55), it was not error to permit plaintiff after the close of the evidence in chief to amend her complaint by inserting the words "State of Indiana on the relation of," immediately before her name in the title, and also in the first line of the complaint. *Brandt v. State, ex rel., Boyer*, 311.
5. *Sale to an Intoxicated Person.—Action on Bond.—Statutes Construed.*—Where a liquor dealer has violated section 15 of the act of March 17, 1875, by selling liquor to an intoxicated person, the injured party has a cause of action on the liquor dealer's bond, as provided by section 20 of the same act, and it is not necessary first to exhaust the principal, but the liability may be enforced in the first instance against the principal and sureties. *Ib.*
6. *Action on Bond.—Defective Complaint.—Bond as Evidence.*—In an action on the bond of a retail liquor dealer where the original complaint was technically defective, but by leave of court was amended after the close of the plaintiff's evidence, the admission of the bond in evidence was not erroneous. *Ib.*
7. *Selling Liquor to Intoxicated Person.—Action on Bond.*—In an action on a saloonkeeper's bond for causing the death of the husband of relatrix in selling him liquor while in a state of intoxication in violation of section 15, act of March 17, 1875, the fact that some of the liquor by which the deceased was intoxicated was procured by him at another saloon, would be no defense, if the liquor furnished by defendant caused additional intoxication, and the injury resulted proximately to the wife's means of support because of such intoxicated condition. *Smiser v. State, ex rel., King*, 519.
8. *Action on Saloonkeeper's Bond.*—In an action on a saloonkeeper's bond for causing the death of the husband of relatrix, a complaint which alleges unlawful sales to the husband and other persons named, and that by reason of the intoxicated condition of such persons, including the husband, in defendant's saloon, the husband was thrown and fell upon the floor and against the wall of said saloon and mortally wounded, is sufficiently definite in the absence of a motion to make more specific. *Ib.*
9. *Location and Arrangement of Room Where Liquors are Sold.—Where License Was Issued Prior to the Taking Effect of the Law.*—Section 4, of the act of March 11, 1895, requiring the room where liquors are sold to be located on a ground floor and so arranged that the interior may be seen from the street, and forbidding the obstruc-

tion of the view of the interior of the room during hours and days when the sales of liquor are prohibited, is valid as to persons doing business under licenses issued prior to the taking effect of the act.

Nelson v. State, 403.

10. *Violation of a Statute May be Without Violating Every Provision.—Statute Construed.*—Under the general provision, in section 4, act of March 11, 1895, "For a violation of this or either of the foregoing sections of this act, the defendant shall be fined," etc., it is not necessary that all the provisions of a section be violated in order to make one liable to a fine. *Ib.*

11. *Obstruction of View of Interior of Saloon on Fourth of July.—Statutory Construction.*—The obstruction of the view of a saloon on July 4, is an indictable offense, under section 4, act of March 11, 1895 (Acts 1895, p. 248), prohibiting the use of screens during those days and hours when sales are "prohibited by law," and under section 2194, Burns' R. S. 1894, providing that whoever shall sell, to be drank as a beverage, any intoxicating liquor upon the fourth of July, shall be "fined." *Ib.*

12. *Duties of Peace Officer in Enforcing the Law.*—The fact that section 7, of the act of March 11, 1895, makes it the duty of peace officers to enforce the provisions of the act in all towns and cities in which a saloon may hereafter be located does not excuse such officers from enforcing the law as to saloons in existence at the time of its taking effect. *Ib.*

13. *Partial Obstruction of View of Interior of Saloon.—Statute Construed.*—Under section 4, of the act of March 11, 1895, providing that the room where liquors are to be sold be so arranged that the whole of said room may be in view of the street or highway, and that no blinds, screens or obstructions to the view shall be arranged or placed so as to prevent the "entire view of such room from the street," the obstruction of any material part of the room is a violation of the act. *Ib.*

JEOPARDY—The jeopardy prohibited in the provision of the State constitution is that which grows out of the same offense, not necessarily of the same transaction, see **CRIMINAL LAW**, 1; *State v. Gapen, 524.*

JUDGMENTS—When taken by default it will not be assumed on appeal that anything was proved beyond what was alleged in the complaint, see **APPEAL AND ERROR**, 14, 15; *Albany Furniture Co. v. Merchants Nat'l Bank, 531.*

1. *Presumptions in Favor Of.*—Presumptions essential to support the judgment are indulged in favor of the court trying the cause. *Warwick v. State, 334.*

2. *Default Set Aside.—Defendant's Excusable Neglect.—Statute Construed.*—Under section 399, Burns' R. S. 1894, making it obligatory upon the court to relieve a party from a judgment taken against him through his mistake, inadvertence, surprise or excusable neglect, a judgment by default will be set aside where it is shown that although the summons was left at defendant's usual place of residence, he in fact had no notice or knowledge thereof.

Kolb v. Raison, 551.

3. *By Confession.—Judgment Note.—When Doctrine of Presumption of Regularity Does Not Apply.*—The doctrine that judgments by confession are sustained by the presumption that they are regular, unless the contrary appears upon the record, is not applicable to a judgment which is not rendered by a judicial officer

or by a court, but merely entered by a ministerial officer without the intervention of any judicial tribunal, on a note containing a provision authorizing any attorney of any court of record to appear and confess judgment for the amount of the note.

Pond v. Simons, 84.

4. *Railroads.—Lien for Improvement of Highway.—Personal Judgment May be Rendered.*—A personal judgment may be rendered against a railway company in an action to foreclose a lien for the improvement of a public highway.

Pittsburgh, etc., R. W. Co. v. Hays, 261.

JUDICIAL NOTICE—Courts will take judicial notice of the history of the Wabash & Erie Canal and the legislation relating thereto, see **WABASH & ERIE CANAL**, 1; *Board, etc., v. Ft. Wayne Water-Power Co., 36.*

1. *As to Terms of Circuit Court.*—The Appellate Court takes judicial notice of the terms of a circuit court.

Sanders, Admx., v. Hartge, 243; Shaffer v. Milwaukee, etc., Ins. Co., 204.

2. *As to Use of Railroad Right of Way.*—The Appellate Court knows judicially that the right of way of railway companies is frequently used for other purposes than that of simply operating trains thereon.

Pittsburgh, etc., R. W. Co. v. Hays, 261.

JURISDICTION—Of Appellate Court, see **APPELLATE COURT**, 1, 2, 3, 4; *Pittsburgh, etc., R. W. Co. v. Hays, 261.*

When May be Presented by Motion to Dismiss.—Where the want of jurisdiction appears on the face of the complaint, the question may be presented by motion to dismiss.

Byers v. Union Central Life Ins. Co., 101.

LANDLORD AND TENANT—

1. *Repairs.—Measure of Damages.*—Where a landlord agrees to make certain repairs and fails to do so, the measure of damages is the difference in the rental value of the premises with the repairs and the rental value without the repairs.

Taylor v. Lehman, 585.

2. *Promise to Repair.—Consideration.*—A promise to repair, made by a landlord to his tenant during the tenancy, and without other consideration than such tenancy, cannot be enforced.

Ib.

3. *Attorney's Fees.*—A provision in a lease for the recovery of attorney's fees in case it becomes necessary to bring an action for the rent does not apply where by reason of a set off or counterclaim there was nothing due the landlord when his action for rent was commenced.

Ib.

4. *Oral Modification of Lease.—Consideration.*—An oral modification of a lease of certain real estate for coal mining purposes, providing for the payment of a smaller royalty, the lessor agreeing to the change in order to induce the lessee to remain in possession and operate the mine, is supported by a sufficient consideration where it is shown that the lease, as modified, was acted upon and carried out to the acceptance of all concerned for many years.

Sargent v. Robertson, 411.

5. *Gas Lease.—Indefiniteness of Description.—Complaint.*—In an action to recover upon a covenant of a gas lease for the payment of a specified sum annually for failure to drill a well within the time specified, where the complaint describes the land as eighty acres of a certain tract, "reserving sixty acres around the buildings on said premises," the boundaries to be designated by the "party of the first

part," the indefiniteness of the description does not defeat the action where it is further alleged that the lessor was ready at all times to locate the boundaries.

Indianapolis Natural Gas Co. v. Spaugh, 683.

LAW OF CASE—A decision of the Appellate Court whether right or wrong is binding upon a subsequent appeal, see **APPEAL AND ERROR**, 26; *Elkhart, etc., R. W. Co. v. Waldorf*, 29.

LEASE—As to indefiniteness of description of real estate, see **LANDLORD AND TENANT**, 5; *Indianapolis Natural Gas Co. v. Spaugh*, 683.

As to oral modification of, see **LANDLORD AND TENANT**, 4; *Sargent v. Robertson*, 411.

LICENSE—To sell intoxicating liquors is not a contract, see **INTOXICATING LIQUORS**, 1; *Nelson v. State*, 403.

To sell intoxicating liquors is not transferable, see **INTOXICATING LIQUORS**, 2; *Pierce v. Pierce*, 107.

LIEN—See **MECHANIC'S LIEN**.

LIMITATION OF ACTION—

Special Damages for Diversion of Water.—In an action for an unreasonable diversion of the water of a lake at certain seasons, the statute of limitation runs from the occurrence of the special damages for which complaint is made.

Valparaiso City Water Co. v. Dickover, 233.

LONGHAND MANUSCRIPT—How made part of the record, see **APPEAL AND ERROR**, 10; *Fitzmaurice v. Puterbaugh*, 318.

MASTER AND SERVANT—

1. *Knowledge of Danger.—Assumption of Risk*.—It is the duty of the master to furnish reasonably safe places in which, and appliances with which the servants are to work, and to exercise the same care to keep them in such condition. The servant assumes all risks ordinarily incident to the work in which he engages, but he does not assume the hazards occasioned by the master's negligent breach of duty, unless with knowledge thereof he continues in the master's service.

Chicago, etc., R. R. Co. v. Wagner, Admr, 22.

2. *Assumption of Risk*.—A railroad brakeman, although without experience, assumes the dangers incident to coupling gravel cars constructed in such manner that by reason of aprons or an extension of the floor of the car at each end only about an inch of space was left between the cars when shoved together, when such aprons were in plain view of the brakeman and he had abundant time and opportunity to see them and had his attention called to them by the conductor and to the necessity of keeping from between them. *Ib.*

3. *Injury to Brakeman on Construction Train.—Assumption of Risk*.—A brakeman on a construction train engaged in the construction of a road and making same safe for travel, knowing the road was incompleated and that no trains other than the construction train had passed over it, by the acceptance of such employment assumed all risks incident to the service, and cannot recover for an injury received while in such service by reason of a defect in such road. *Baltimore, etc., R. W. Co. v. Welsh*, 505.

4. *Defective Machinery.—Assumption of Risk.*—If a servant knows of a defect in machinery with which he is working, and notifies the master, and the master expressly or impliedly promises to remedy the defect by making necessary repairs, and the servant relies upon such promises and continues in the service, and within a reasonable time after the promise to repair has been made, is injured, he will not be held to have assumed the risk.

East Chicago, etc., Co. v. Williams, 573.

5. *Defective Machinery, When Risk Not Assumed by Employee.*—If an employe accepts employment where he is to use defective machinery, and the defect is at the time known to the master, and is not disclosed to the employe, and the defect is of such a character that it is not open to observation, and could not be discovered by the use of ordinary care, such employe does not assume the risk of the service.

Ib.

MECHANIC'S LIEN—

1. *Contractor.—Sub-materialman.*—A corporation which does not manufacture boilers, but furnishes to mills and factories engines and boilers, using the engines of its own make, and boilers made by a third party, which agrees to furnish a manufacturer an engine and boiler delivered on board the cars, the purchaser to pay the freight charges, is a mere materialman and not a contractor within the meaning of section 7255, Burns' R. S. 1894, so as to give the party furnishing the boiler a materialman's lien.

Caulfield v. Polk, 429.

2. *Payment Before Filing of Notice.—Rights of Sub-materialman.*—Payment by the owner of real estate to one who had contracted to furnish certain machinery for a building, before the notice of mechanic's lien was filed, and within the time for filing, neither enlarges nor diminishes the right to a lien by a third party who furnished part of the machinery.

Ib.

MISCONDUCT OF COUNSEL—How question as to may be saved, see PRACTICE, 3; *Houk v. Branson, 119.*

When not reversible error, see PRACTICE, 4; *Louisville, etc., R. W. Co. v. Norman, 355.*

MORTGAGES—When the record of is not notice to a fire insurance company of the existence of mortgage on insured property, see INSURANCE, 8; *Shaffer v. Milwaukee Mechanics Ins. Co., 204.*

MOTIONS—See NEW TRIAL; CONTINUANCE.

When motion to paragraph complaint properly overruled, see PLEADING, 15; *Shaw v. Ayers, 614.*

MUNICIPAL CORPORATIONS—See TOWNS.

1. *Liability for Defective Streets and Sidewalks.*—An incorporated town may become liable for injuries resulting from defective streets and sidewalks.

Town of Kentland v. Hagan, 1.

2. *Public Improvements.—Assessments.*—Assessments for street and other improvements are upheld upon the theory that each lot or tract of land is benefited in a special and peculiar manner in a sum equal to the amount estimated or assessed against it.

Becker v. Baltimore, etc., R. W. Co., 324.

3. *Street Improvements.—Joint Assessment Voidable.—Statute Construed.*—Under section 4293, Burns' R. S. 1894, an assessment for a street improvement which is made jointly against two or more separate and distinct tracts of land is voidable.

Ib.

4. *Street Improvements.—Assessment.—Sufficiency of Description.*—An assessment for street improvements which describes the real estate sought to be assessed as a "tract of land, north side, between Front street and O. and M. R. R.," is invalid because of the uncertainty and insufficiency of the description. *Ib.*
5. *Street Improvements.—Invalid Assessment May be Amended.*—An erroneous or invalid assessment for street improvement may, upon proper application to the common council or board of trustees, be amended. *Ib.*
6. *Improvement of Street.—Preliminary Order.*—The preliminary order by resolution declaring a necessity for the improvement of a street, as provided by section 4289, Burns' R. S. 1894, is not essential to the jurisdiction of the town board.
Pittsburgh, etc., R. W. Co. v. Hays, 261.
7. *Public Improvements.—Irregularity of Proceedings.*—Where the whole matter of making local improvements is conferred upon municipal corporations, and exclusive and original jurisdiction over the same is given them for that purpose the proceeding will not be void if there has been an attempt to comply with the statutory requirements, although such attempt does not amount to a strict compliance. An irregularity that will overthrow the proceedings must be such as will prevent the execution of the judgment. *Ib.*
8. *The Use of the Word "Street" in an Ordinance.*—The use of the word "street" in an ordinance passed by a town board, providing for a certain improvement, sufficiently indicates that it was not an ordinary public highway which was being improved, but a highway within the town. *Ib.*

NEGLIGENCE—See MASTER AND SERVANT.

Alighting from a moving train, see RAILROADS, 5, 6, 7; *Louisville, etc., R. R. Co. v. Espenscheid, 558; Cincinnati, etc., R. R. Co. v. Revalee, 657.*

Evidence of repairs made after the injury, is not admissible to show prior negligence, see EVIDENCE, 5; *Chicago, etc., R. R. Co. v. Lee, Admr., 215.*

NEW TRIAL—The question as to the allowing or refusal to allow any interrogatory to be answered by the jury is properly presented by a motion for new trial, see PRACTICE, 8; *Town of Kentland v. Hagan, 1.*

1. *Joint Motion For.*—There is no error in overruling a joint motion for a new trial which is not good as to all who join in it.
Brandt v. State, ex rel Boyer, 311.
2. *Sufficiency of Affidavit in Support of Motion When Party Claims to Have Been Misled by Court as to Time of Trial.*—A motion for a new trial on the ground that defendant was misled by the statement of the court that the cause would be continued indefinitely, is properly overruled, where the affidavits in support of the motion do not show that a motion for a continuance was made, and that the defendant had a good and meritorious defense to the action.
Prudential Ins. Co. v. DeBord, 224.
3. *When Motion for Must be Made During Term at Which Verdict was Rendered.*—Courts Will Take Judicial Notice of Terms of Circuit Courts.—*Statute Construed.*—This court knows judicially that November 14, 1894, the date the verdict was returned, was not

the last day of the September term of the Delaware Circuit Court, and as appellants did not make a motion for a new trial during the term at which the cause was tried they waived their right to file a motion for a new trial under section 570, Burns' R. S. 1894, providing that motions for a new trial shall be made during the term of court at which the verdict or decision is rendered, unless the verdict or decision is rendered on the last day of the term, when such motion may be made on the first day of the next term.

Shaffer v. Milwaukee Mechanics Ins. Co. 204.

4. *Newly Discovered Evidence.—Affidavit in Support of Motion.—Counter-Affidavits, Scope Of.*—Where a motion is made for a new trial on the ground of newly discovered evidence, and is supported by affidavits, counter-affidavits may be filed questioning the credibility of the alleged newly discovered evidence.

Hammond, etc., R. W. Co. v. Spyzchalski, 7.

NOTICE—As to notice by publication to non-resident appellee on appeal, see **APPEAL AND ERROR**, 38; *Shaefer v. Nelson*, 489.

OATH—

Upon Belief.—A statement sworn to upon the belief of affiant is equivalent to one sworn to in absolute terms.

Deering Harvester Co. v. Peugh, 400.

OFFICERS—

County Clerk.—Presumption.—Claim Against Decedent's Estate.—In the absence of a showing to the contrary it must be presumed that a county clerk, being a public officer, did what the law required him to do, and that a claim filed against a decedent's estate was properly transferred to the issue docket.

Sanders, Admx., v. Hartge, 243.

OPINION EVIDENCE—When properly excluded, see **EVIDENCE**, 12; *Elkhart, etc., R. R. Co. v. Waldorf*, 29.

ORDINANCES—Objections which go only to matters of form or to irregularities in the proceedings of municipal authorities may be passed upon by the Appellate Court, see **APPELLATE COURT**, 2; *Pittsburgh, etc., R. W. Co. v. Hays*, 261.

PARENT AND CHILD—

1. *When a Liability for Services Rendered.*—Where a parent and his or her adult children live together as members of the same family, there is no implied undertaking on the part of either to pay for services; but such undertaking may arise not only from an express contract, but it may be inferred from surrounding circumstances.

Jessup v. Jessup, Admr., 177.

2. *Decedent's Estates.—Claim of Mother for Caring for Her Adult Son.*—An adult son, whose mental and physical condition disqualified him from rendering any service, lived with and was cared for by his mother with the express understanding that she was to be compensated therefor. The son died intestate, and the mother filed a claim against his estate for such services, which was allowed and paid by the administrator. *Held*, that in the absence of a showing that the amount paid for the services was excessive, and that such services could have been performed for less, that the claim was a proper charge against the estate. *Ib.*

PASSENGER—Wrongful ejectment from train, see **CARRIERS**, 3, 4, 5; *Baltimore, etc., R. R. Co. v. Norris*, 189.

PAYMENT—When tender operates as, see **TENDER**, 8; *Martin v. Bott, Gdn.*, 444.

By note given by third party, see **BILLS AND NOTES**, 6, 7; *Wipperman v. Hardy*, 142.

1. *How Applied to Different Existing Obligations.*—The law applies a payment first to a debt with the least security, unless there be peculiar equities calling for a different appropriation, but the law will not sanction the application of a payment made by a third person, at the instance of and for the benefit of another, to an obligation upon which neither such third person nor the debtor for whose benefit the payment was made was liable. *Ib.*
2. *Refusal of Creditor to Apply Payment as Directed by Debtor.*—Where the creditor refuses to apply the payment as directed by the debtor but accepts the payment so made, he must apply such payment as directed. *Ib.*

PLEADING—See **COMPLAINT**.

1. *Plea in Abatement and Plea in Bar.*—*Order of Pleading.*—A plea in abatement must precede an answer in bar. *Sanders, Admx., v. Hartge*, 243.
2. *Answer.*—*Abatement.*—Matter in abatement, showing that the action was prematurely brought, cannot be pleaded with an answer in bar. *Voluntary Relief Department, etc., v. Spencer*, 123.
3. *Must Proceed Upon a Single Theory.*—A pleading cannot proceed upon more than one theory, and if, in form, it does, the court may construe it as proceeding upon the theory most apparent and most clearly authorized by the facts stated, and require the case to be tried upon that theory. *Miller v. Miller*, 605; *Indianapolis Natural Gas Co. v. Spaugh*, 683; *School City of Lafayette v. Bloom*, 416; *Sanders, Admr., v. Hartge*, 243.
4. *Construction Of.*—The language used in a pleading must be given a reasonable and fair construction, and in determining the rights of the parties thereunder the court will look to the nature of the acts alleged. *Miller v. Miller*, 605.
5. *Complaint.*—*Clerical Error.*—A mere clerical error in the use of the word “plaintiff” where it is clear that the pleader intended to use the word “defendant” will not vitiate the pleading, but on appeal the pleading will be given the force which the proper word would have given it if the mistake had not been made. *Fry v. Colborn*, 96.
6. *Action Based on Written Instrument.*—*Exhibit.*—When a written instrument which is the foundation of an action is filed as an exhibit with the pleading, as required by section 365, Burns’ R. S. 1894, it becomes a part of the pleading, and will cure uncertainties therein. *Albany Furniture Co. v. Merchants Nat’l Bank, etc.*, 93.
7. *Complaint.*—*Exhibit.*—An allegation in a complaint on a note which is made an exhibit and is signed by a company and two persons, that the latter two signed the note as “security” will be construed to mean that they signed as “surety.” *Ib.*
8. *Joint Cause of Action.*—*Complaint.*—A complaint which fails to state a joint cause of action in favor of all plaintiffs who join therein, is bad on demurrer for sufficient facts. *Indianapolis Natural Gas Co. v. Spaugh*, 683.

9. *Complaint.—Sufficiency of in Action for Damages.—Negligence.*—In an action against a railroad company to recover for the death of plaintiff's decedent the general averments of negligence, or want of contributory negligence or knowledge of dangerous defects, will be deemed sufficient as against a demurrer, unless the facts specifically stated clearly show the contrary; the general averment of knowledge or want of knowledge includes both actual and imputed knowledge.
Chicago, etc., R. R. Co. v. Wagner, Admr., 22.
10. *Complaint. — Negligence.— Willfulness.* — A complaint alleging that defendant "purposely, wrongfully and negligently," set fire to certain straw and stubble which he had purposely and negligently permitted to accumulate upon his lands, at a time of drought and while a stiff wind was blowing toward plaintiff's land, so that it was impossible to control the fire which spread to plaintiff's premises, proceeds upon the theory of negligence. *Miller v. Miller, 605.*
11. *Complaint on Account for Goods Sold to Defendant's Agent.*—A complaint for goods sold and delivered to defendant's agent, is not sufficient on demurrer without an allegation that the goods were sold at the instance or request of the defendant, or upon his order, or that they were sold upon his credit. *Fry v. Colborn, 96.*
12. *Action on Lease. — Complaint.* — Where two parties join as plaintiffs in an action against the lessor to recover upon the covenant of a lease which, by its terms, runs only to one of the parties, a complaint which fails to aver what interest the other had in the subject-matter of the suit, except her signature to the lease, is demurrable for failure to state a joint cause of action in favor of both plaintiffs. *Indianapolis Natural Gas Co. v. Spaugh, 683.*
13. *Complaint on Accident Policy.*—In a complaint on a policy of accident insurance an allegation that "the said plaintiff has fully complied with his contract with said defendant to be performed by said plaintiff," sufficiently alleges that plaintiff had performed all the conditions on his part. *Pacific Mut. Life Ins. Co. v. Turner, 644.*
14. *Complaint.—Sufficiency Of in an Action for Slander.*—A complaint in an action for slander based upon the words spoken by defendant to plaintiff in presence of others, "Well, I believe you took it," sufficiently states the extrinsic facts from which the words derive a slanderous import, as against an objection raised for the first time after verdict, where it alleges that such words were spoken in reply to plaintiff's statement that he heard that the defendant stated that he stole the watch, and that the defendant thereby maliciously imputed to plaintiff the crime of larceny and charged that he had feloniously stolen the watch, which was of the value of twenty-five dollars. *Alcorn v. Bass, 500.*
15. *Motion to Paragraph, When Properly Overruled.* — A motion to require plaintiff to separate his complaint into paragraphs is properly overruled, where it states a cause of action for damages on account of fraudulent representations in regard to property bought, and also charges defendants with conversion but does not state facts sufficient to constitute a cause of action for conversion.
Shaw v. Ayers, 614.
16. *Time for Filing Answer.—Discretion of Court.*—Where an action is brought, and defendants enter their appearance, and the cause is continued from term to term for more than two years, it is within the discretion of the court to permit defendants to file an answer, it not appearing that defendants objected to any of the numerous continuances, nor that they ever asked that a rule be entered requiring defendants to answer.
Thompson v. Shewalter, 290.

17. *Answer of Garnishee. — Sufficiency Of.*—The answer of a garnishee, summoned as a judgment debtor of defendant, averring that the judgment had been compromised and settled, and entered satisfied in the proper court, *prima facie* shows that the garnishee defendant is not indebted to the attachment defendant on the judgment. *Ib.*

18. *Garnishment. — Refusal to Permit Answer After Default.*—Where in a garnishment proceeding the principal defendant entered her appearance and asked that a default taken against her be set aside and that she be permitted to answer, plaintiffs having filed their written consent, the refusal of the court to permit the filing of the answer is not prejudicial to the plaintiffs. *Ib.*

19. *Failure of Defendant to Demur or Answer.*—Where the defendant fails to demur or answer to a complaint, and judgment is taken by default, such failure is a confession that the complaint is true as to the facts stated.

Albany Furniture Co. v. Merchants Nat'l Bank, 531.

20. *Appeal. — When a Defect in a Pleading May be Taken Advantage of After Judgment on Default.*—Where a defect in a pleading is such that it would have been available on demurrer before judgment, it may be taken advantage of on appeal after judgment rendered on default. *Albany Furniture Co. v. Merchants Nat'l Bank, 93.*

POOR—As to employment of physician for by township trustee, see TOWNSHIP TRUSTEE, 2, 3, 4; *Board, etc., v. Galloway, 689.*

PRACTICE—A general verdict is disregarded where it is inconsistent with the special verdict, see VERDICT; *Taylor v. Lehman, 585.*

A motion to dismiss as to garnishee defendant is equivalent to a motion for judgment on the pleadings, see GARNISHMENT, 1; *Rigney v. Jacobs, 545.*

1. *Amendment of Pleading Pending Trial. — Continuance.*—A pleading having been amended pending the trial of a cause it was not error to overrule a motion for a continuance, where the affidavits in support thereof did not show distinctly in what respect the parties asking the delay were prejudiced by the amendment.

Brandt v. State, ex rel., Boyer, 311.

2. *Continuance. — Discretion of Court.*—An application for a continuance is addressed to the sound discretion of the court, and where there has been no abuse of such discretion, the refusal of the continuance is not available error. *Ib.*

3. *Misconduct of Counsel.*—In order to save any question as to the misconduct of counsel during the trial, the trial court must be called upon by the aggrieved party in some manner to correct the injury. *Houk v. Branson, 119.*

4. *Misconduct of Counsel.*—Overruling an objection to a statement by counsel in his argument to the jury, in an action against a railroad company for stock killed, in commenting on the testimony of a certain witness as follows: "He knows that this railroad company never pays for stock killed," is not reversible error where the court admonished counsel to confine his remarks to the evidence, and to keep within the record.

Louisville, etc., R. W. Co. v. Norman, 355.

5. *Cross-Examination of Witness. — Discretion of Court.*—The extent to which a cross-examination of a witness may be carried is within the sound discretion of the court, and unless there is

manifest abuse of such discretion its exercise by the trial court will not afford sufficient ground for a reversal of the judgment.

Houk v. Branson, 119.

6. *Evidence.—Impeachment.*—Evidence of the general reputation of a witness for truth and veracity in the neighborhood in which he formerly lived is competent which follows evidence of a like nature as to his reputation where he then lived. *Ib.*
7. *Interrogatories to Jury—Venire de Novo.*—Allowing or refusing to allow certain questions to be asked the jury as a part of the special verdict is no ground for a *venire de novo*.
Town of Kentland v. Hagan, 1.
8. *Interrogatories to Jury.—New Trial.*—The allowing or refusing to allow any interrogatory, and the changing or modification of any interrogatory, by the court, may be objected to by counsel, and the exception to the ruling saved by bill of exceptions, and is properly presented by motion for new trial. *Ib.*
9. *Conflict Between General Verdict and Answers to Interrogatories.*—Where there is an apparent conflict between the general verdict and the answers to interrogatories returned therewith, the general verdict must control unless the answers are such as that both cannot be true under any supposable condition of the evidence within the issues. *Fitzmaurice v. Puterbaugh*, 318.
10. *Interrogatories to Jury.—Contradictory Answers.*—If answers to interrogatories are contradictory then they nullify each other, and those which might alone control the general verdict cannot overthrow it. *Ib.*
11. *Indefinite Answers to Interrogatories by Jury.—Instructions.*—Where the evidence will warrant definite and specific answers to interrogatories submitted to the jury, and after deliberation the jury returns into court with indefinite answers, it is not error for the court to instruct the jury in relation to answering the interrogatories, and to send it back to the jury-room for further deliberation. *Hammond, etc., R. W. Co. v. Spyzchalski*, 7.
12. *Special Verdict.—Motion for Judgment On.*—A motion by defendant for judgment on a special verdict will be considered as having been refiled, where defendant moved for a reduction of the damages awarded to plaintiff while the former motion was pending, and the court treated it as still pending and ruled thereon without the withdrawal of the motion to reduce the damages.
Louisville, etc., R. R. Co. v. Renicker, 619.
13. *Verdict.—Error in Assessment of Damages.—New Trial.—Statutory Construction.*—The only way the amount of damages named in the verdict of a jury can be questioned, where the action is upon a contract, or for the injury or retention of property, is by a motion for a new trial, assigning the fifth statutory cause as provided in section 568, Burns' R. S. 1894 (559, R. S. 1881). *Ib.*
14. *Special Finding.—Exception.*—When the court, at the request of either party, makes a special finding of facts, and states its conclusions of law thereon, an exception to the conclusions of law is an admission, for the purpose of the motion, that the facts are fully and correctly found. *North British, etc., Ins. Co. v. Koontz*, 625.
15. *Special Finding.—Amendment After Judgment.*—After the court has made its finding of facts, stated its conclusions of law, and rendered judgment thereon, such court has no power to amend and supply defects in a special finding on motion of one of the parties. *Ib.*

PRINCIPAL AND AGENT—A saloonkeeper is not liable on his bond for the payment of fine and cost assessed against his bartender for an unlawful sale of intoxicating liquor, see INTOXICATING LIQUORS, 8; *State, ex rel. Denney v. Leach*, 174.

1. *Insurance*.—When an agent is acting within the scope of his agency or authority his knowledge thus obtained is the knowledge of his principal, and his principal is bound by his acts; but where knowledge is obtained by such agent wholly independent of the business or employment of his principal, and in a transaction in which his principal is not connected, such rule will not apply.
Shaffer v. Milwaukee, etc., Ins. Co., 204.
2. *Deposit of Principal's Money by Agent.—Liability of Principal for Overdraft of Agent*.—Where a principal furnishes money to his agents to purchase wheat for him for cash, and the agents deposit the money as received, on their own account, together with other money, with a merchant, the merchant knowing of the original agency and knowing that the agents were acting for their principal, and such agents issue checks on such deposits in payment of wheat purchased by them for their principal and for other purposes, and finally withdraw the balance on deposit and pay same to their principal in settlement, the merchant with whom the deposits were made cannot recover from the principal a balance on a check issued by such agents against such deposit, for wheat purchased for the principal at a time when they had money on deposit, and which was presented by the payee thereof with the request that part payment only be made thereon, the balance of which such merchant was required to pay after the deposits had all been withdrawn, the principal having no knowledge of the unpaid check at the time the money was paid him.
Allen v. Davis, 338.

PRINCIPAL AND SURETY—

1. *Bills and Notes*.—Where a note has been executed by the principal, a party signing it as surety, at a time subsequent to the incurring of the original obligation, without any new or distinct consideration passing therefrom, is not liable.
Wipperman v. Hardy, 142.
2. *Conditional Execution of Note by Surety*.—One who signs a promissory note as surety with the express understanding that he shall have a certain responsible co-surety, which fact is known to the payee of the note at the time of accepting the same, will not be bound upon the contract unless the condition as to the additional surety imposed upon the principal and known to the payee is fully and strictly complied with before delivery of the instrument.
Deering Harvester Co. v. Peugh, 400.

PROCESS—

Service of Summons.—Indorsement on Complaint.—Statute Construed.—Where plaintiff's indorsement on his complaint, as provided by section 524, Burns' R. S. 1894, fixing the day on which defendant shall be summoned to appear, is so defective as not to be within the permission given by the statute, yet the clerk accepts it as a sufficient indorsement, and acts upon it as such in the issuing of the summons, the action will be deemed to have commenced.
Axtell v. Workman, 152.

PROMISSORY NOTE—See BILLS AND NOTES.

PROVOCATION—

1. *Assault and Battery.*—Where words reasonably calculated under the circumstances to provoke the party to whom they are addressed are used, the court or jury trying the cause will be justified, in the absence of evidence to the contrary, in inferring the intent from such fact. *Warwick v. State, 334.*
2. *Assault and Battery.—Present Ability.—Statute Construed.*—The phrase “who has the present ability to do so” as used in section 2067, Burns’ R. S. 1894 (1983, R. S. 1881), is held to mean that the person to whom such phrase applies is free from physical impediment or restraint which might prevent him at the time from striking or attempting to strike, or to do other violence to the person giving the offense. *Ib.*
3. *Assault and Battery.—Judgment.—Statute Construed.*—A finding in a judgment that defendant is guilty of provocation as charged in the affidavit, the affidavit charging that “the defendant did * * * by words, signs and gestures, provoke and attempt to provoke G to commit an assault and battery on the prosecuting witness,” etc., is proper if the court found defendant guilty either of a provoke or an attempt to provoke an assault and battery, as the same punishment is, under section 2067, Burns’ R. S. 1894 (1983, R. S. 1881), affixed to either offense. *Ib.*

RAILROADS—See MASTER AND SERVANT.

Right of way may be assessed for the improvement of highways, see **HIGHWAYS**; *Pittsburgh, etc., R. W. Co. v. Hays, 261.*

Personal judgment may be rendered against a railway company in an action to foreclose a lien for improvement of highway, see **JUDGMENTS, 4**; *Ib.*

Appellate Court takes judicial notice that the right of way of a railway company is frequently used for other purposes than operating trains thereon, see **JUDICIAL NOTICE, 2**; *Ib.*

1. *Defective Roadbed.—Complaint.*—A complaint against a railroad company seeking to recover for the death of an employe caused by the negligence of the company in maintaining its track and roadbed in an unsafe condition, must aver that deceased was ignorant of the unsafe condition of the roadbed. *Chicago, etc., R. R. Co. v. Lee, Admr., 215.*
2. *Negligence.—Knowledge of Defective Roadbed.—Complaint.*—In an action against a railroad company for the death of an employe caused by the negligence of the company in permitting signal wires to remain across the track, unboxed, between which wires the foot of intestate became fastened while he was in the act of making a coupling, a complaint alleging that “the wires were so small and so near the ground that they were not perceived by decedent before he was caught thereby, and that he was ignorant of the danger, and that it was not to him apparent,” does not sufficiently aver a want of knowledge of the defect. *Ib.*
3. *General Officers.—Power of to Employ Medical Attendance for Injured Workmen.*—The president, vice president, general manager, secretary and treasurer are general officers of a railroad company and have power to employ medical attendance for workmen injured in the performance of duty in the company’s service. *Bedford Belt R. W. Co. v. McDonald, 492.*
4. *General Officers.—Employment of Surgeon, Not Ultra Vires.*—The employment of a surgeon by the general officers of a railroad corporation to render his services to employes in case of injury in

the course of their employment, without compensation other than the value of the services actually rendered, is not *ultra vires*. *Ib.*

5. *Alighting From Moving Train.—Negligence.*—Where a railroad company stops its train at a station for about three minutes, it is not liable to one who went upon the train with his daughters to find seats for them, for an injury caused by his attempting to alight after the train had started, the servants in charge of the train having no knowledge of his intentions.

Louisville, etc., R. R. Co. v. Espenscheid, 558.

6. *Alighting From a Moving Train.—Contributory Negligence.*—In an action against a railroad company for personal injuries sustained by plaintiff while in the act of leaving a train at a passenger station, a special verdict finding that plaintiff was not on the bottom step of the car when the train started, and that the train had moved about six feet and was moving when plaintiff stepped off, and that there was no sudden jerking of the train, shows that plaintiff was guilty of contributory negligence. *Ib.*

7. *Injury of Passenger Alighting from Train.—Contributory Negligence.*—A passenger on a railway train, who goes upon the platform of the coach while the train is going very slow preparatory to stopping at her destination, and when the train has stopped attempts to alight, but in doing so is thrown upon the station platform by a sudden starting of the train without warning, is not, as a matter of law, guilty of contributory negligence.

Cincinnati, etc., R. R. Co. v. Revalee, 657.

8. *Failure to Maintain Proper Cattle-Guards.—Killing of Stock.—Special Finding.*—A special finding that plaintiff's horses wandered upon defendant railroad company's right of way, by reason of the inherently defective cattle-guards maintained at a crossing, is conclusive as to defendant's liability under section 5323, Burns' R. S. 1894.

New York, etc., R. R. Co. v. Zumbaugh, 171.

9. *Negligence.—Fire Escaping from Right of Way.*—A special verdict which finds that combustible materials were permitted by a railroad company to accumulate and remain upon its right of way; that it was an exceedingly dry time and there was a brisk wind blowing towards plaintiff's land from the adjoining right of way; that sparks from a passing engine set fire to the material, and the company negligently permitted it to escape to plaintiff's land and destroy his property, is sufficient to sustain a judgment for plaintiff.

New York, etc., R. R. Co. v. Grossman, 652.

10. *Fire Escaping from Right of Way.—Duty of Adjoining Landowner.*—A landowner adjoining a railroad right of way who uses his premises in the ordinary and customary manner, is not guilty of contributory negligence for failing to resort to special or extraordinary precautions to prevent the destruction of his property from fire happening through the negligence of the railroad company. *Ib.*

REMONSTRANCE—Against the construction of a sewer, see **SEWERS**, 2; *Byram v. Foley, 629.*

RESIDENCE—

Not Lost Till Another is Acquired.—A man can have but one place of residence; and to lose his residence in one place he must acquire a residence in another. *Green v. Simon, 360.*

SALES—When representations of the vendor amount to fraud, see **FRAUD**; *Fitzmaurice v. Puterbaugh, 318.*

1. *Implied Warranty*.—One who sells a chattel with knowledge that it is to be used for a particular purpose, impliedly warrants the same to be reasonably fit for that purpose. *Ib.*
2. *Executed and Executory Contracts*.—*Remedies for Breach Of*.—In a bargain and sale the subject of the contract becomes the property of the buyer the moment the contract is concluded, whether the goods are delivered to the buyer, or remain in the possession of the seller. In an executory contract the goods remain the property of the seller until the contract is executed. In case of sale the buyer can claim the specific goods, and they are at his risk. In case of executory contract the purchaser does not become the owner, and the goods are not at his risk. His remedy, if there be a breach, is confined to an action for damages.
Branigan v. Hendrickson, 198.
3. *Executory Contract*.—A contract for the purchase of hogs, stipulating that the seller is to retain and feed the hogs corn till a certain date, at which time the buyer is to pay balance on purchase price, and the hogs be weighed at certain scales, and delivered, and in case the hogs should get sick the buyer to take them at once or release all claim to them, is an executory contract. *Ib.*

SCHOOLS—

Contract with Teacher.—*Power of School Board to Revoke*.—A board of school trustees cannot summarily, without cause, revoke a contract of employment made with a teacher before the commencement of the term of service specified in the contract, under a provision in the contract that the employment is subject to the right of the board to remove such teacher at any time upon two weeks' notice.
School City of Lafayette v. Bloom, 461.

SCHOOL TOWNSHIPS—See TOWNSHIP TRUSTEE.

Sufficiency of complaint in an action to recover for supplies sold to trustee, see COMPLAINT, 4; *First Nat'l Bank, etc., v. Adams School Tp., 375.*

Powers of Trustee Limited to Those Delegated by Statute.—*Attorney's Fees*.—A school township cannot be held liable upon an attorney fee clause in a note. The powers of trustee to make contracts being limited to those granted by statute.
Snoddy v. Wabash School Tp., 284.

SEWERS—

1. *Collateral Drains*.—*Assessments*.—*Complaint for Collection of Assessments*.—*Statute Construed*.—Property abutting on an alley through which a collateral drain to a local sewer has been constructed may be assessed for the construction of such local sewer, under section 3857, Burns' R. S. 1894. *Byram v. Foley, 629.*
2. *Assessments for Construction*.—*Remonstrance*.—*Collateral Attack*.—Section 3856, Burns' R. S. 1894, confers upon the board of public works of the city of Indianapolis the power to assess property for the construction of local sewers and collateral drains, and also provides a remedy for the property owner by permitting him to remonstrate within a time fixed by statute, and if the property owner fails to avail himself of his right to remonstrate, he has had his day in court, and in an action to enforce the lien of the assessment he cannot attack the assessment by an answer averring that his property was not benefited. *Ib.*
3. *Jurisdiction of Board of Public Works to Make Assessments*.—*Collateral Attack*.—*Statute Construed*.—The assessment for the

construction of a sewer in the city of Indianapolis is within the jurisdiction of the board of public works, under the act of March 6, 1891, and acts amendatory thereto, and its acts are conclusive, in the absence of fraud, and such assessment cannot be declared void in a collateral attack. *Ib.*

4. *Action by Contractor to Enforce the Collection of Assessments.—Presumption of Regularity.—Collateral Attack.*—In a collateral attack upon the right of a contractor to enforce the assessment for the construction of a sewer, every presumption will be indulged in favor of the action of the city through its board of public works, and unless the complaint discloses a state of facts which shows clearly that the assessment is void, its regularity will be presumed. *Ib.*
5. *Double Assessment.—Statute Construed.*—Property abutting on a street on which a local sewer has been constructed may be assessed for the payment thereof under section 8857, Burns' R. S. 1894, notwithstanding such property had previously been assessed for the construction of a sewer. *Ib.*

SLANDER—Sufficiency of complaint in action for, see PLEADING, 14; *Alcorn v. Bass*, 500.

1. *Complaint.*—In a complaint for slander it is not necessary that the inducement and colloquium precede the statement of the words alleged to have been spoken, but is sufficient if inserted in any portion of the paragraph of complaint. *Ib.*
2. *Slandorous Words.—When Question of Fact.*—While it is for the court to determine what constitutes a crime or offense the imputation of which is slanderous, it is the province of the jury to determine as a matter of fact the actual meaning of the words charged in the particular case and the effective sense in which they were understood. *Ib.*
3. *Complaint.—Words Charged Not Actionable per se.—How Affected by Verdict.*—Where the words spoken were susceptible of an innocent meaning and a criminal meaning, the court after verdict for the plaintiff, upon a motion in arrest of judgment, or upon an assignment of error, will adopt the latter meaning, and when the language is rendered actionable by extrinsic circumstances defectively averred, the verdict will aid them, though language not actionable *per se*, in the absence of extrinsic circumstances will not be so regarded, even after verdict. *Ib.*

SPECIAL FINDING—Exceptions to the conclusions of law by the court admits, for the purpose of the motion, that the facts are correctly found, see PRACTICE, 14; *North British, etc., Ins. Co. v. Koontz*, 625.

Court cannot amend after judgment, see PRACTICE, 15; *Ib.*

SPECIAL VERDICT—As to motion for judgment on, see PRACTICE, 12; *Louisville, etc., R. R. Co. v. Renicker*, 619.

When general assessment of damages will control, see APPEAL AND ERROR, 24; *Haffield v. Pain*, 347.

1. *Court May Modify Interrogatories.—Statute Construed.*—Under the act of March 11, 1895, providing as to the form and manner of preparation of a special verdict, it is within the power of the court to modify interrogatories prepared by counsel, or to frame new ones, if those prepared by counsel are not so framed as to be readily understood by the jury, or if they might, in the opinion of the court, fail to elicit from the jury material facts.
Hammond, etc., R. W. Co. v. Spyzchalski, 7.

2. *Interrogatory to Jury, When Improper.*—In an action against a railroad company for damages by fire escaping from defendant's right of way, an interrogatory to the jury, under the act of March 11, 1895, which asks if the fire which started in combustible materials on the right of way escaped, without fault or negligence of the plaintiff to plaintiff's land, and burned and damaged his property as described in the complaint, is improper as embracing more than a single fact and also as calling for a conclusion.
New York, etc., R. R. Co. v. Grossman, 652.
3. *Failure to Find Material Fact.—Accident Insurance.*—A special verdict in an action on a policy of accident insurance which did not find the period for which the policy was issued, or that the policy was in force at the time of the accident, is not sufficient to sustain a judgment.
Pacific Mut. Life Ins. Co. v. Turner, 644.
4. *Payment.—Finding Of is an Ultimate Fact.*—A special verdict, in an action on a promissory note, wherein the jury found that the note in suit was fully paid and satisfied before the commencement of the action is the finding of an ultimate fact and not a conclusion of law.
Wipperman v. Hardy, 142.
5. *Assessment of Damages.—Statutes Construed.—Slander.*—In an action for slander where a special verdict has been returned by the jury, under the act of March 11, 1895, it is proper for the jury to assess the damages in the alternative form based upon the facts found, as the said act of March 11, 1895, should be construed with section 557, Burns' R. S. 1894, which provides that, "In actions for the recovery of money the jury must assess the amount of recovery."
Cole v. Powell, 438.

STATUTE OF LIMITATIONS—May not begin to run because of fraudulent concealment, see AGENCY; *Day v. Dages, 228.*

STATUTORY CONSTRUCTION—As to assessments for street improvements, see MUNICIPAL CORPORATIONS, 3; *Becker v. Baltimore, etc., R. W. Co., 324.*

As to impounding cattle found running at large, see ANIMALS, 1, 2, 8; *Beeson, by Next Friend, v. Tice, 78.*

As to actions against a foreign corporation, see CORPORATIONS, 2, 8; *Byers v. Union Central Life Ins. Co., 101.*

Default may be set aside for defendant's excusable neglect, see JUDGMENTS, 2; *Kolb v. Raiser, 551.*

When a prosecution for an offense will not bar a prosecution for another offense growing out of same transaction under another statute, see CRIMINAL LAW, 5; *State v. Gapen, 524.*

As to filing of schedule for householder's exemption by wife in absence of husband, see EXEMPTION, 2; *Green v. Simon, 360.*

As to liability of saloonkeeper on his bond for sale of intoxicating liquor to an intoxicated person, see INTOXICATING LIQUORS, 5; *Brandt v. State, ex rel., Boyer, 311.*

Obstruction of view of interior of saloon on fourth of July, see INTOXICATING LIQUORS, 11; *Nelson v. State, 403.*

As to indorsement on complaint fixing day defendant shall be summoned to appear, see PROCESS; *Axtell v. Workman, 152.*

As to second application for change of venue, see VENUE, 2; *Louisville, etc., R. W. Co. v. Martin, 679.*

As to the special verdict law of 1895, see SPECIAL VERDICT, 1, 5; *Hammond, etc., R. W. Co. v. Spyzchalski*, 7; *Cole v. Powell*, 438.

Violation of a statute may be without violating every provision thereof, see INTOXICATING LIQUORS, 10; *Nelson v. State*, 403.

As to sufficiency of assignment of error, see APPEAL AND ERROR, 2; *Louisville, etc., R. W. Co. v. Norman*, 355.

Improvement of Street Adjoining Railroad Right of Way.—Constitutional Law.—The contention of a railroad company that its right of way would not be benefited by the improvement of an adjoining highway, and that to charge the costs thereof upon the right of way would be taking property without due process of law, goes to the construction and application of the statute and not to its constitutionality.

Pittsburgh, etc., R. W. Co. v. Hays, 261.

STREET RAILWAYS—

Collision With Locomotive at Crossing.—Complaint.—In an action against an electric street railway company, by a passenger, for personal injuries sustained by reason of a collision of the electric car with a locomotive at a crossing, it is not necessary to allege that the electric railway was located on a public highway and that those in charge of the locomotive had given the proper signals designating an intention to cross the highway, where it is alleged that neither the locomotive nor the electric car gave any signal of its approach to the crossing, and that those in charge of the electric car saw the locomotive approaching and knew that it would reach the crossing at the same time with the electric car.

Hammond, etc., R. W. Co. v. Spyzchalski, 7.

STREETS—Liability of town for injuries resulting from defective streets, see TOWNS; *Town of Worthington v. Morgan*, 603.

The word "street" in an ordinance refers to a highway within the corporate limits, see MUNICIPAL CORPORATIONS, 8; *Pittsburgh, etc., R. W. Co. v. Hays*, 261.

As to the preliminary order declaring a necessity for improvement of, see MUNICIPAL CORPORATIONS, 6; *Ib.*

Sufficiency of description of real estate sought to be assessed for street improvements, see MUNICIPAL CORPORATIONS, 4; *Becker v. Baltimore, etc., R. W. Co.*, 324.

Joint assessment for improvement of, voidable, see MUNICIPAL CORPORATIONS, 3; *Ib.*

Invalid assessment for improvement of may be amended, see MUNICIPAL CORPORATIONS, 5; *Ib.*

SUMMONS—Defective indorsement of on complaint, see PROCESS; *Axtell v. Workman*, 152.

SURETYSHIP—See PRINCIPAL AND SURETY.

As to conditional execution of note by surety, see PRINCIPAL AND SURETY, 2; *Deering Harvester Co. v. Peugh*, 400.

TELEGRAPH COMPANIES—

1. *When Damages May be Recovered for Negligence, Causing Mental Anguish Alone.*—A telegraph company may be held liable for special damages for failing to deliver a message, although the damages consist of mental anguish alone, where the language of

the message gives direct notice to the company that the message concerns such event or events as that negligence on the part of the company is likely to be followed by mental distress.

Western Union Tel. Co. v. Bryant, 70.

2. *Form of Telegram.—Mental Anguish.*—The language of the telegram : "Can not come to-day. Will come to-morrow," did not advise the company that a failure to deliver it would be likely to cause mental distress. *Ib.*
3. *Failure to Deliver Telegram.—When Damages too Remote to Permit a Recovery.*—The physical discomforts of a woman occasioned by her walking and carrying heavy parcels a distance of four blocks as a result of the failure of a telegraph company to deliver the message : "Cannot come to-day. Will come to-morrow," are damages too remote to permit of a recovery. *Ib.*
4. *Action for Failure to Deliver Message.—Complaint.—Nominal Damages.*—A complaint alleging a failure of a telegraph company to deliver a message, for which pay was received in advance, to a person to whom it was addressed, is sufficient to withstand a demurrer, as it shows a right to nominal damages. *Ib.*

TENDER—

1. *Finding of Court as to.*—A tender to be good in law must be made in the legal tender notes or coin of the United States. A finding by the court that a tender of the "lawful sum in money" is not equivalent to a finding that the tender was a legal tender. *Martin v. Bott, Gdn.*, 444.
2. *Guardian and Ward.*—Where a guardian in an attempted settlement with his ward made to her a tender of a certain amount which was refused, and the guardian made his final report to the court and paid to the clerk thereof, for the use and benefit of his ward, the amount so tendered, less \$64.00 for taxes, expenses of making report, etc., such payment to the clerk not being the amount originally tendered, the tender was not kept good. *Ib.*
3. *When Operates as a Payment.*—Where a lawful tender of money has been made and kept good by bringing it into court and it is not accepted by the party to whom it is made, nor taken out of court, and it is found upon the trial that a larger sum is due, it operates as a payment on the sum finally recovered. *Ib.*

THEORY—A pleading must proceed upon a single theory, see PLEADING, 3; *Miller v. Miller*, 605.

TOWNS—

Defective Streets.—Liability for Damages by Reason Thereof.—An incorporated town has exclusive power over its streets, and is under duty to use ordinary care to keep them in a reasonably safe condition for travelers thereon, exercising ordinary care, and in default thereof is liable in damages for injuries thereby sustained.

Town of Worthington v. Morgan, 603.

TOWNSHIP TRUSTEE—See SCHOOL TOWNSHIPS.

1. *Not Authorized to Purchase "Reading Circle Books" for use of Pupils.*—A township trustee has no authority to purchase on account of his township "reading circle books" for the individual use of pupils, even though such books were useful and necessary, as they have no place in or connection with the schools within the meaning and provisions of the law. *First National Bank, etc. v. Adams School Tp.*, 375.

2. *When May Bind County for Medical Aid to Poor.*—A township trustee as overseer of the poor has power to bind the county for medical aid for a poor person of his township, where the physician employed by the county has abandoned his contract.

Board, etc., v. Galloway, 689.

3. *Employment of Physician for Poor.—Agent for the County.*—A township trustee in the employment of a physician for the poor is the agent of the county, and can only bind the county while he acts within the scope of his authority as prescribed by statute. *Ib.*

4. *Employment of Physician for Poor.*—A township trustee as overseer of the poor has no authority to bind the county by his contract in the employment of a physician to attend the poor where the county has already made provisions therefor. *Ib.*

TRUSTEE—When a guardian illegally appointed may be regarded as, see **GUARDIAN AND WARD**; *Jessup v. Jessup, Admr., 177.*

ULTRA VIRES—The employment of surgeon by the general officers of a railroad corporation not *ultra vires*, see **RAILROADS**, 4; *Bedford Belt R. W. Co. v. McDonald, 492.*

Where a private corporation has entered into a contract not immoral in itself and not forbidden by statute, and it has been in good faith fully performed by the other party, the corporation will not be heard on a plea of *ultra vires*, see **CORPORATIONS**, 1; *Ib.*

VENIRE DE NOVO—Allowing or refusing to allow certain questions to be asked the jury as a part of the special verdict is no ground for, see **PRACTICE**, '7; *Town of Kentland v. Hagan, 1.*

VENUE—As to attorney's fees in criminal cases after change of venue, see **COSTS**, 1, 2; *Board, etc., v. Pollard, 470.*

1. *Change of Venue.—Application For.—Duty of Court.*—Where, in a civil case, an application is made for a change of venue on the ground of local prejudice, in accordance with section 416, Burns' R. S. 1894, it is the imperative duty of the court to grant the change. *Louisville, etc., R. W. Co. v. Martin, 679.*

2. *Second Application for Change of.—Statute Construed.*—Under section 417, Burns' R. S. 1894, providing that only one change of venue shall be granted to the same party, a change of venue will not be denied because of a previous refusal to grant the change, for a reason no longer existing. *Ib.*

3. *Change of.—Prejudicial Error.*—Error in overruling an application for a change of venue for local prejudice against the applicant is not rendered harmless by a subsequent waiver, by such applicant, of a trial by jury. *Ib.*

4. *Change of Venue.—Allowance of Costs and Expenses.—Statute Construed.*—Section 418, Burns' R. S. 1894 (414, R. S. 1881), providing for the manner of allowance and payment of costs and expenses in changes of venue, in so far as it applies to criminal cases, has been superseded and impliedly repealed by sections 1847, 1848, Burns' R. S. 1894 (1778, 1779, R. S. 1881). *Board, etc., v. Pollard, 470.*

VERDICT—

Practice.—General and Special Verdict.—Where the jury at the request of one of the parties returns a special verdict, it is the duty of the court to disregard the general verdict returned, where the same is inconsistent with the special verdict.

Taylor v. Lehman, 585.

WABASH AND ERIE CANAL—

1. *Judicial Notice.*—The courts will take judicial notice of the history of the Wabash and Erie Canal, and the legislation relating thereto. *Board, etc., v. Ft. Wayne Water Power Co., 36.*
2. *When the Duty of Purchaser of Canal to Maintain Bridges.*—The burden of maintaining a bridge over a feeder of the Wabash and Erie Canal, which bridge forms part of a public highway that existed prior to the construction of the canal, rests upon the purchaser of the canal and not upon the county. *Ib.*

WAREHOUSEMAN—When a bailee, see **BAILMENTS**; *Baker v. Born, 422.*

WARRANTY—One who sells a chattel with knowledge that it is to be used for a particular purpose impliedly warrants the same to be reasonably fit for that purpose, see **SALES**, 1; *Fitzmaurice v. Puterbaugh, 318.*

WATERS—

1. *Diversion of Water from Lake by Water Company.*—The diversion of water from a lake by a water works company in supplying a city with water is an extraordinary use of the water which can only be exercised reasonably and with proper regard for the rights of others. *Valparaiso City Water Co. v. Dickover, 233.*
2. *Diverting Water from Lake by Water Company.—Liability to Riparian Owner.*—Where water works erected at the margin of a lake for the purpose of supplying a city with water results in a perceptible diminution of the water opposite the lands of another riparian owner to his injury during dry seasons, an action will lie against the water company for the damages accrued to the date of the commencement of the action. *Ib.*
3. *Liability for Unreasonable Diversion of Water from Lake.—Measure of Damages.*—In an action by a riparian owner against a water company for an unreasonable diversion of water from a lake, the measure of damages is the difference in the rental value of the property injured. *Ib.*

WILLFUL INJURY—Liability of railroad company for willful injury of trespasser by conductor, see **CARRIERS**, 2; *Baltimore, etc., R. R. Co. v. Norris, 189.*

WITNESS—As to impeachment of, see **PRACTICE**, 6; *Houk v. Branson, 119.*

The extent to which a cross-examination may be carried is within the sound discretion of court, see **PRACTICE**, 5; *Ib.*

Ex. 6. 3. 74.

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